

# THE LATEST DEVELOPMENTS IN COMBATING ONLINE SEX TRAFFICKING

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## HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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## C O N T E N T S

	Page
Hon. Marsha Blackburn, a Representative in Congress from the State of Tennessee, opening statement .....	2
Prepared statement .....	3
Hon. Michael F. Doyle, a Representative in Congress from the Commonwealth of Pennsylvania, opening statement .....	3
Prepared statement .....	5
Hon. Susan W. Brooks, a Representative in Congress from the State of Indiana, opening statement .....	5
Hon. Frank Pallone, Jr., a Representative in Congress from the State of New Jersey, prepared statement .....	75
Hon. David B. McKinley, a Representative in Congress from the State of West Virginia, prepared statement .....	75
WITNESSES	
Hon. Ann Wagner, a Representative in Congress from the State of Missouri ...	6
Prepared statement .....	9
Yiota G. Souras, Senior Vice President and General Counsel, National Center for Missing and Exploited Children .....	17
Prepared statement .....	20
Derri Smith, Chief Executive Officer, End Slavery Tennessee .....	29
Prepared statement .....	31
Russ Winkler, Special Agent in Charge, Tennessee Bureau of Investigation ....	35
Prepared statement .....	37
Eric Goldman, Professor, Santa Clara University School of Law .....	44
Prepared statement .....	46
SUBMITTED MATERIAL	
H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, submitted by Mrs. Blackburn .....	76
Letter of November 27, 2017, from Alexandra F. Levy, University of Notre Dame Law School, to Mrs. Blackburn and Mr. Doyle, submitted by Mr. Doyle .....	82
Response to Online Sex Trafficking and the Communications Decency Act hearing, Shared Hope International, et al., October 3, 2017, submitted by Mrs. Blackburn .....	84
Letter of November 27, 2017, from Shared Hope International, et al., to Mrs. Blackburn, submitted by Mrs. Blackburn .....	93
Article, "Wyden blocks bill to stop online sex trafficking," by Rebecca Bender, The Register-Guard, November 30, 2017, submitted by Mrs. Blackburn .....	95
Letter of April 3, 2012, from Mrs. Blackburn and Hon. Carolyn B. Maloney to Larry Page, Chief Executive Officer, Google, Inc., submitted by Mrs. Blackburn .....	99
Letter of November 30, 2017, from Chris Cox, Outside Counsel, NetChoice, to Mrs. Blackburn and Mr. Doyle, submitted by Mrs. Blackburn .....	101
Article, "Congress must stop sex trafficking on the internet," by Mrs. Blackburn, The Tennessean, November 29, 2017, submitted by Mrs. Blackburn ...	121



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THURSDAY, NOVEMBER 30, 2017

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:22 p.m., in Room 2123, Rayburn House Office Building, Hon. Marsha Blackburn (chairman of the subcommittee) presiding.

Members present: Representatives Blackburn, Lance, Latta, Guthrie, Olson, Kinzinger, Bilirakis, Johnson, Long, Flores, Brooks, Collins, Walters, Costello, Doyle, Welch, Loeb sack, Ruiz, Rush, Eshoo, Engel, Butterfield, Matsui, and McNerney.

Staff present: Jon Adame, Policy Coordinator, Communications and Technology; Ray Baum, Staff Director; Kelly Collins, Staff Assistant; Robin Colwell, Chief Counsel, Communications and Technology; Sean Farrell, Professional Staff Member, Communications and Technology; Adam Fromm, Director of Outreach and Coalitions; Gene Fullano, Detailee, Communications and Technology; Elena Hernandez, Press Secretary; Paul Jackson, Professional Staff Member, Digital Commerce and Consumer Protection; Tim Kurth, Senior Professional Staff Member, Communications and Technology; Lauren McCarty, Counsel, Communications and Technology; Alex Miller, Video Production Aide and Press Assistant; Evan Viau, Legislative Clerk, Communications and Technology; Jessica Wilkerson, Professional Staff Member, Oversight and Investigations; Everett Winnick, Director of Information Technology; David Goldman, Minority Chief Counsel, Communications and Technology; Jerry Leverich, Minority Counsel; Dan Miller, Minority Policy Analyst; and Tim Robinson, Minority Chief Counsel.

Mrs. BLACKBURN. The Subcommittee on Communications and Technology will now come to order.

I am sorry that we are a few minutes late in beginning, but we have this thing we have to do around here called votes. And we did have a vote on the floor and, in the middle of it, a colloquy concerning our schedule.

At this time, I recognize myself for 5 minutes for an opening statement.

**OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE**

Good afternoon, and a warm welcome to each of our witnesses who are going to join us today. We are here on what has turned out to be an absolutely gorgeous day in Washington, DC, but we are here to talk about a very ugly, sordid subject, and that is online sex trafficking or, as the name of Ms. Smith's organization describes it more bluntly, slavery.

As the stings and headlines continue to proliferate, those who thought that slavery was something that could never happen in 2017 America have had to confront the terrifying reality that not only is it happening, it is on the rise. And it is on the rise in large part because the internet, the technological masterpiece of our time, has made it much easier to do.

In both the House and the Senate this year, we are facing up to the challenge with a long-overdue conversation, driving toward effective action. With this hearing, it is my hope that the Communications and Technology Subcommittee, with our particular focus, will add some valuable perspective about exactly what is going wrong and what is going right on the tech side as the lowest of the low harness the power of the internet to enslave and exploit our children.

I am so very pleased that Ms. Smith and Mr. Winkler have been able to join us today to tell their stories of how Tennessee has been impacted by this abhorrent crime. Like so many of the districts that my colleagues represent, our home has been invaded by criminals luring in vulnerable women and children and forcing them into a life of sex slavery and unspeakable abuse.

I know that you both share my deep sadness and absolute outrage that this is happening in our backyard. And I cannot thank you enough for rescuing the victims, then helping them heal while seeking justice for their abusers. You are doing a superlative job.

For the fifth year in a row—get this—Tennessee received an A on its report card in the Protected Innocence Challenge, a comprehensive annual study of existing State laws. And this is compiled by Shared Hope International. The challenge produces State report cards that rate how effectively each State responds to the crime of domestic minor sex trafficking.

After 4 years of straight A's, Tennessee outdid itself this year by leading the rankings, number one in the country. What a testimony to the partnership between Tennessee law enforcement and victim advocates that you have built and grown together over the years. We are honored that you are taking time away.

The legislative debate this year has focused on amendments to section 230 of the Communications Decency Act, which law enforcement has consistently identified as a barrier preventing effective prosecution of online entities that facilitate trafficking and adequate recourse for trafficking victims.

Today, we welcome my colleague and dear friend, Ann Wagner, who is leading this charge in the House. I look forward to hearing her testimony about her efforts to find an effective approach to attack and defeat this problem. She has been a passionate and tireless advocate, and I am proud to be a cosponsor of her bill.

I also want to welcome and we look forward to hearing the concerns and the perspective of Ms. Souras and Mr. Goldman as we consider next steps. With so many women and children waiting on us and counting on us, doing nothing is not an option.

[The prepared statement of Mrs. Blackburn follows:]

#### PREPARED STATEMENT OF HON. MARSHA BLACKBURN

Good afternoon and a warm welcome to all of our witnesses. We have come here together on this beautiful afternoon to talk about a very ugly subject: online sex trafficking, or as the name of Ms. Smith's organization describes it more bluntly, slavery. As the stings and the headlines continue to proliferate, those who thought that slavery was something that could never happen in 2017 America, have had to confront the terrifying reality that not only is it happening, it is on the rise. And it is on the rise in large part because the Internet, the technological masterpiece of our time, has made it much, much easier to do. In both the House and the Senate this year, we are facing up to the challenge with a long overdue conversation driving toward effective action. With this hearing, it is my hope that the Communications and Technology Subcommittee, with our particular focus, will add some valuable perspective about exactly what is going wrong and what is going right on the tech side as the lowest of the low harness the power of the Internet to enslave and exploit our children.

I am so very pleased that Ms. Smith and Mr. Winkle have been able to join us today to tell their stories of how Tennessee has been impacted by this abhorrent crime. Like so many of the districts that my colleagues here represent, our home has been invaded by criminals luring in vulnerable women and children, and forcing them into a life of sex slavery and unspeakable abuse. I know that you both share my deep sadness and outrage that this is happening in our own backyard, and I cannot thank you enough for rescuing these victims, then helping them heal while seeking justice for the abusers. You are truly doing the Lord's work.

And you are doing a superlative job of it. For the fifth year in a row, Tennessee received an "A" on its report card in the Protected Innocence Challenge, a comprehensive annual study of existing State laws conducted by Shared Hope International. The challenge produces State report cards that rate how effectively each State responds to the crime of domestic minor sex trafficking. After four years of straight A's, Tennessee outdid itself this year by leading the rankings, #1 in the country. What a testimony to the partnership between Tennessee law enforcement and victim advocates that you have built and grown together over the years. We are honored that you would take time away from your important work to give us the latest perspective from the front lines.

The legislative debate this year has focused on amendments to section 230 of the Communications Decency Act, which law enforcement has consistently identified as a barrier preventing effective prosecution of online entities that facilitate trafficking, and adequate recourse for trafficking victims. Today we welcome my colleague and dear friend Mrs. Wagner, who has led the charge in the House. I look forward to hearing her testimony about her efforts to find an effective approach to attack this problem we are all facing. She has been a passionate and tireless advocate, and I am proud to be a cosponsor of her bill. And I also look forward to hearing the perspectives and concerns of Ms. Souras and Mr. Goldman as we consider our next step. With so many women and children waiting on us and counting on us, standing still is not an option.

Mrs. BLACKBURN. At this time, I yield back my time, and I recognize Mr. Doyle for 5 minutes.

#### OPENING STATEMENT OF HON. MICHAEL F. DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Madam Chair, for holding this important hearing.

And thank you to the witnesses for appearing before us today. Human trafficking in all its forms and, in particular, sexual trafficking of children and adults is an abhorrent crime. I want to

thank the witnesses here today from End Slavery Tennessee, the National Center for Missing and Exploited Children, and the Tennessee Bureau of Investigation. This is hard work that you all do, and I know that it carries a heavy burden. For my part, I want to thank you for your efforts and the efforts of your organizations. Be assured this is an issue of great concern to all of us.

I also want to thank Representative Wagner for testifying before us today. I understand that this is an issue that you have been working on for some time and that the SAVE Act that you wrote, and which has become law, is starting to be used to combat online sex trafficking.

I also understand that, in reference to the bill before us today, you are working with Chairman Goodlatte on an amendment in the nature of a substitute to your bill and hope that it will be marked up in the Judiciary Committee. I am hopeful that you will be able to move your amended bill out of committee and before the full House for a vote.

I also want to acknowledge the good work being done by Senators McCaskill and Portman and the Senate's Permanent Subcommittee on Investigations in the investigation and report they released on Backpage.com. This report is truly frightening. The report alleges that Backpage knowingly facilitated child sex trafficking.

I am deeply concerned about emails sent by Backpage moderators seeking to limit the number of ads they were reporting to NCMEC on a monthly basis. In addition, according to the report, Backpage repeatedly edited and altered ads by deleting words, phrases, and images that would indicate child sex trafficking without reporting those ads to NCMEC or other authorities. Again, according to this report, these edits were done for the express purpose of concealing the illegal nature of these activities.

Backpage went so far as to deploy software that automatically deleted terms from ads before publication, words such as "AMBER Alert," "rape," "young," and "fresh." This filter was apparently deployed for the purpose of concealing the true nature of the transactions that were occurring on the site.

The report goes on to say that, by Backpage's own internal estimates, they were editing between 70 to 80 percent of the ads in the adult section of their site.

Backpage would go on to start rejecting ads that contained these words, but then they would do so with a popup that would include explicit instructions for advertisers as to what the offending word or phrase was and how they could repost their ad to get around Backpage's filters.

Backpage used similar techniques when advertisers posted ads identifying people as under 18, simply instructing users to change the posted age in order for the ad to be posted.

To my mind, this report indicates a vast criminal enterprise. I am heartened by reports that there are potentially multiple Federal investigations using insights from the Senate report and an impaneled grand jury. My hope is that justice can be done.

Madam Chair, I thank you for this hearing, and I yield back.

[The prepared statement of Mr. Doyle follows:]



## PREPARED STATEMENT OF HON. MICHAEL F. DOYLE

Thank you madam chairman for holding this important hearing, and thank you to the witnesses for appearing before us today.

Human trafficking in all its forms—and in particular sexual trafficking of children and adults—is an abhorrent crime. I want to thank the witnesses here today from End Slavery Tennessee, the National Center for Missing and Exploited Children, and the Tennessee Bureau of Investigation. This is hard work that you all do, and I know it carries a heavy burden. For my part, I want to thank you for your efforts and the efforts of your organizations. This is an issue of great concern to us all.

I'd also like to thank Representative Wagner for testifying before us today. I understand that this is an issue that you have been working on for some time—and that the SAVE Act that you wrote and which has become law is starting to be used to combat online sex trafficking.

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The report goes on to say that by Backpage's own internal estimates they were editing between 70–80 percent of ads in the Adult section of their site.

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To my mind this report indicates a vast criminal enterprise. I am heartened by reports that there are potentially multiple Federal investigations using insights from the Senate report and an empaneled grand jury.

My hope is that justice can be done.

Mrs. BLACKBURN. The gentleman yields back.

Ms. Brooks, you are recognized. We will see if Chairman Walden makes it, but you are recognized for your comments.

**OPENING STATEMENT OF HON. SUSAN W. BROOKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA**

Mrs. BROOKS. Thank you, Madam Chairwoman.

And I am very, very pleased to see our colleague and a leader in the House of Representatives, Representative Wagner, who, since we came in together 5 years ago, has been a strong, strong voice fighting for the victims and educating the American people about Backpage and other avenues of sex trafficking.

I just want to take a moment to commend the State of Indiana. I was involved as a United States attorney from 2001 to 2007, and, during that time, the Bush administration put a huge focus on exploitation and on child exploitation. And we started an effort called IPATH now, which is about protection against human trafficking.

And it brings together law enforcement, victim services; it puts in place protocols.

But I will tell you that the criminals and the perpetrators are always trying to stay one step ahead. They are always trying to find ways to exploit children, women, and others in order to satisfy their sexual desires. And it is very, very difficult work. Law enforcement work around the world to find victims and the webs that they have created. And the perpetrators, which coordinate around the world, are something that we must continue to pursue with every avenue we possibly can.

And, finally, I just want to focus on the victims. The victims of this type of sexual exploitation, sexual trafficking, can be found in every district in our country, from urban areas to rural areas to suburban areas. And I think people are often shocked when they read in our papers or read about the victims. And we must make sure that we are there for the victims.

So I just want to commend Ann Wagner and so many Members on both sides of the aisle who have stepped up to really lead the charge and try and say that we cannot allow this type of human slavery in this day and age to continue and we must continue to fight it. And I just want to thank my colleague from Missouri for being a leader.

And I yield back.

Mrs. BLACKBURN. The gentlelady yields back.

Is there any other Member seeking recognition?

No other Member seeking recognition, at this time I want to recognize Mr. Pallone—who is not here—for his 5 minutes.

Any other Member seeking recognition?

Mr. DOYLE. Oh, Madam Chairman, I—

Mrs. BLACKBURN. Mr. Doyle.

Mr. DOYLE. Thank you. I forgot, I need to ask unanimous consent to enter into the record a letter to yourself and myself from Professor Alexander Levy of the University of Notre Dame Law School.

Mrs. BLACKBURN. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. DOYLE. Thank you.

Mrs. BLACKBURN. All right. At this point, our first witness for today's panel will include Mrs. Ann Wagner, representing Missouri's Second Congressional District, who will give opening remarks regarding her efforts on the issue.

Mrs. Wagner, you are recognized for 5 minutes.

**STATEMENT OF HON. ANN WAGNER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF MISSOURI**

Mrs. WAGNER. I thank you, Madam Chairman and Ranking Member Doyle and colleagues, for hosting this committee hearing today and for allowing me to give some opening remarks.

I appreciate your commitment to addressing online trafficking and especially appreciate that so many members of this subcommittee have publicly cosponsored H.R. 1865. Stopping the victimization of America's children and adults online is my top priority in Congress, and I know I have an ally in Chairman Blackburn. I also appreciate subcommittee members Adam Kinzinger and Yvette Clarke for being original cosponsors of my bill.

My first major piece of legislation concerning online trafficking was the SAVE Act, which became law in 2015. The SAVE Act was a first step in addressing Federal-level prosecutions of websites. Unfortunately, it has not yet been used, presumably because the mens rea standard in the legislation, knowingly, is too high. Moreover, the SAVE Act was federally focused, and it did not enable States and local prosecutors to protect their communities.

I have learned a lot since then. And this is why, over a year and a half ago, I began working on H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act, or FOSTA. The bill is written for victims, not only because it would allow victims to pursue civil justice but because it would empower local prosecutors to take down websites that facilitate trafficking before they ever reach the size or the scope of Backpage.com.

The House understands that enabling vigorous criminal enforcement is not just important but mandatory in any legislation we pass. This is why over 170 of my colleagues cosponsored FOSTA when I personally explained to them how websites can perpetuate modern-day slavery with impunity.

Why are these websites able to sell our children? Because judges have ruled that section 230 prevents websites that exploit the most vulnerable members of our society from being held accountable. Congress' response to these rulings must be patently clear. Section 230 of the Communications Decency Act was never intended to allow businesses to commit crimes online that they could never commit offline. When Congress passed the Communications Decency Act in 1996, it explicitly acted to prevent the internet from becoming a red light district, and it clearly did not believe that rape was a prerequisite of a free and open internet.

What Congress cannot do is pass a bill that amends section 230 but is so narrow that it could only be used to prosecute Backpage.com.

Let me be plain: I support the Senate's recent action on my legislative proposal. I appreciate the complicated strategic environment that Senators Blumenthal and Portman and others are operating in. And I believe that it is a step in the right direction. But the Senate bill is not the full solution.

Backpage.com is currently, as Mr. Doyle stated, the largest of the websites that facilitate trafficking in America, but it is already under Federal investigation, and it is just a small, small piece—small piece—of this growing criminal ecosystem. Hundreds—and let me underscore—hundreds of advertising sites have jumped into the marketplace of illegal sex. For instance, Eros serves as the high-end market. Escorts In College advertises women close to and under the age of consent. And Massage Troll is, sadly, popular in my own district.

Thanks to Senator Portman's investigation, a wealth of evidence against Backpage.com has been discovered over the past year. And while it may now be possible, though still incredibly difficult, to prove that Backpage.com knowingly assisted in sex trafficking violations, it is not possible to gather this level of evidence for the hundreds of other websites that are profiting from the sex trade.

I have spoken with prosecutors across the country who have asked the House to pass a practical solution that will allow them

to take predatory websites off the internet. And I am repeatedly told that any legislation that depends exclusively on the “knowingly” mens rea standard is merely a Washington, DC, feel-good exercise. Congress might pat itself on the back but will have accomplished little to prevent the sale of victims online.

FOSTA is centered on the “reckless disregard” standard that prosecutors need to open cases on bad actor websites. And we must find a way to maintain a useful mens rea standard or, at the very least, not raise the very high bar that victims and prosecutors must already meet.

If we are serious about helping victims, we must create laws that allow for a robust State and local criminal enforcement. Criminal enforcement means businesses will stay out of the illegal sex trade, fewer people will ever become victims, demand will be reduced, and, yes, civil suits will be easier to bring. The criminals who auction our children will be put behind bars.

I believe, in closing, we can mark up a bipartisan House bill that will provide meaningful tools to prevent future victimization. And I look forward to working with you to pass a forward-facing—forward-facing—solution that will disrupt the online trafficking industry.

I thank you, Madam Chairman, and I thank you all on the committee and my colleagues for allowing me to give these opening remarks.

[The prepared statement of Mrs. Wagner follows:]

**United States House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Communications and Technology**

**Hearing: Latest Developments in Combating Online Sex Trafficking  
November 30, 2017**

Testimony of Congresswoman Ann Wagner (R-MO)  
Sponsor of H.R. 1865, *Allow States and Victims to Fight Online Sex Trafficking Act*

Thank you, Madame Chairman and Ranking Member Doyle, for hosting this hearing today. I appreciate your commitment to addressing online sex trafficking and especially appreciate that so many members of this Subcommittee have cosponsored H.R. 1865. I am also very grateful that the Chairman publicly supported the legislation earlier this year and has become one of my closest allies. In addition, Subcommittee members Representatives Yvette Clarke and Adam Kinzinger were both original cosponsors of the bill.

I hope that this hearing will be a productive discussion on how Congress can best protect victims and end the immunity that websites that facilitate human trafficking have enjoyed under Section 230 of the Communications Decency Act (CDA). For far too long, victims of this crime have been overlooked and underserved, and it has been my top priority in Congress, as trafficking has moved from the streets to the internet, to stop the victimization of America's children and adults.

My first major piece of legislation concerning online trafficking was the *Stop Advertising Victims of Exploitation Act* (the "SAVE Act"), which became law in 2015. The SAVE Act was a good first step in addressing federal-level prosecutions,<sup>1</sup> but it did not enable state and local prosecutors to

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<sup>1</sup> Unfortunately, the SAVE Act has not yet been used by the Department of Justice, presumably because the *mens rea* standard used in the legislation—"knowingly"—is too high. I have learned a lot since then, and I am adamant that we

protect their communities.<sup>2</sup> This is why, over a year and a half ago, I began work on H.R. 1865, the *Allow States and Victims to Fight Online Sex Trafficking Act* (or “FOSTA”). I introduced the bill in April after extensive consultations with victims, advocacy groups, civil attorneys, law enforcement, and prosecutors.

I believe that this bill is in many ways the gold standard in addressing online trafficking. It has three main prongs: 1) it would allow victims of sex trafficking and sexual exploitation of children crimes to pursue civil cases under federal and state law; 2) it would allow state and local prosecutors to enforce state statutes that prohibit sex trafficking or sexual exploitation of children; and 3) it would amend the federal criminal code to essentially create a new crime that makes it unlawful for websites to publish information provided by a user with reckless disregard that the information is in furtherance of a sex trafficking offense.<sup>3</sup>

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pass a bill to address online trafficking that is of practical use in disrupting the sex trade and preventing exploitation of victims.

<sup>2</sup> See *Online Sex Trafficking and the Communications Decency Act: Hearing before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations*, October 3, 2017, House of Representatives, 115th Cong. (2017) (*Testimony of Mary Leary*), at page 12 (explaining that “The Internet has grown all aspects of our modern economy including the illicit economy of sex trafficking. Often state and local prosecutors are uniquely situated to be the first to see the emergence of new websites engaged in such illegal activity. They must have the ability to respond quickly to these harmful sites that are preying on children and vulnerable adults in their local communities. Federal prosecution is discretionary. Because of the limited resources of the federal government, traditionally, federal prosecutors take cases only of certain magnitudes and with broad impact. Each advertising site that partners with traffickers is often first seen on the local level. Therefore, it is more effective to enable state and local prosecutors to investigate and prosecute these sites when they are small – before they become large enough to exploit larger numbers of victims and garner federal attention. This is not only effective law enforcement, it is essential in the sex trafficking context because each ad represents a person being monetized for brutal rape and sexual exploitation multiple times a day. The more effective law enforcement approach is to investigate and prosecute those websites that participate in trafficking victims as they emerge and before the number of “hits” from purchasers number in the thousands. In so doing hundreds of trafficking victims will not be sold and thousands of rapes can be prevented”).

<sup>3</sup> The bill also expresses the intent of Congress that Section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex with sex trafficking victims.

The bill is written for victims—not only because it would allow victims to pursue civil justice, but because it would empower local prosecutors to take down websites that facilitate trafficking before they ever reach the size and scope of Backpage.com.

The bill prevents victimization because it would produce more prosecutions of bad actor websites, more convictions, and more predators behind bars. If Congress establishes a real tool to ensure that businesses cannot commit crimes online that they could never commit offline, fewer businesses will enter the sex trade, and fewer victims will ever be sold and raped.

The U.S. House of Representatives understands that enabling vigorous criminal enforcement is not just important, but mandatory in any legislation we pass. That is why over 170 of our colleagues cosponsored FOSTA when I personally explained to them how websites can perpetuate modern day slavery with impunity.

Why are these websites able to sell our children? Because multiple judges have ruled that Section 230 of the Communications Decency Act preempts the ability of victims and state and local prosecutors to combat websites that exploit the most vulnerable members of our society. For example, in August 2017, the California Attorney General tried to hold Backpage.com accountable for pimping. Sacramento Superior Court Judge Lawrence Brown wrote that “If and until Congress sees fit to amend the immunity law [Section 230], the broad reach of the CDA even applies to those alleged to support the exploitation of others by human trafficking.”

When Congress passed the Communications Decency Act in 1996, it never intended for the internet to become a red-light district.<sup>4</sup> It clearly did not believe that rape was a prerequisite of the

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<sup>4</sup> Senator J. James Exon, author of the Communications Decency Act, said on the Senate floor at the time that “the information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices. Once

free and open internet;<sup>5</sup> or that intellectual property should be better protected under federal law than the lives of America's children. So Congress' response to rulings from the Sacramento Superior Court and other jurisdictions must be patently clear: businesses that sell trafficking victims should be vigorously held accountable, and Section 230 does not stand in the way of justice.

Importantly, Congress cannot pass a bill that amends Section 230 but is so narrow that it could only be a means of prosecuting Backpage.com. I support the Senate's recent action on my legislative proposal,<sup>6</sup> and I believe that it is a step in the right direction. I appreciate that the Senate efforts have retained the carve-out for the federal private right of action established in the *Trafficking Victims Protection Reauthorization Act* (18 U.S.C. 1595) that was used in *Doe vs. Backpage.com*.<sup>7</sup> I understand that the Senate companion bill was negotiated in a complicated strategic environment, but the bill in its current form is not the full, future-oriented solution.

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passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions." But the CDA in practice *has* allowed the internet to become a red light district. The anti-indecency provisions of the CDA were struck down a year after passage in *Reno vs. ACLU*. Only Section 230 remained.

<sup>5</sup> See Testimony of Mary Leary, *supra* note 2, at 7 (explaining that "The CDA was never intended to provide absolute immunity to service providers. However, since its enactment in 1996, forces have combined to create an atmosphere of de facto absolute immunity for online businesses. The CDA, as the name implies, was passed as part of a broad Congressional effort to address the impending challenges of the nascent Internet. Section 230, entitled Protection for Private Blocking and Screening of Offensive Material, manifested Congress's intent to have a flourishing Internet, which was then in its infancy, and remove disincentives to develop and utilize technology to block harmful content. Congress struck that balance by providing limited immunity for service providers, allowing immunity for Good Samaritan providers and those who host third party content but do not create it. However, Congress explicitly stated that this immunity should not be construed to limit enforcement of federal criminal laws or consistent state laws. Although Congress intended limited immunity, the current interpretation of the CDA perversely undermines that Congressional intent").

<sup>6</sup> Senator Portman and Senator Blumenthal introduced the *Stop Enabling Sex Traffickers Act* in the U.S. Senate in August 2017, a companion bill to H.R. 1865 with some changes made to gain the endorsement of tech companies, helpful for passage, that unfortunately weakened tools for state and local prosecutors.

<sup>7</sup> Unfortunately, FOSTA's carve-out for state civil cases was removed in the Senate companion. The Senate version of the federal civil carve-out has been narrowed and is now based on the "knowingly" *mens rea* standard, which will not provide operational recourse to justice for victims across the country and thus may not actually prevent future victimization. Moreover, claims using the carve-out cannot be brought in state/local courts and would be subject to a heightened pleading standard. I continue to stand in solidarity with victims who are pursuing cases based on state laws, and believe Congress should keep working toward a comprehensive solution.



Backpage.com is currently the largest of the websites that facilitate trafficking in America, but it is already under federal investigation, and it is just a small piece of this growing criminal ecosystem. Advertisements are already shifting off Backpage.com and to other websites. Since Backpage.com began successfully claiming Section 230 immunity in 2010, hundreds of advertising sites have jumped into the marketplace of illegal sex. For instance, Eros serves the high-end market; Escorts in College advertises women close to and under the age of consent; and Massage Troll is popular in my district. Beyond these advertising hubs, there are also hobby boards: websites where johns post reviews of their sexual encounters. The Erotic Review serves as the Yelp of the sex market, allowing users to rate victims on shockingly graphic details that I will not repeat here.

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I ask this Committee to consider whether under section 1595, if the Senate companion were to pass, the plaintiff would have to establish that the website (1) “knowingly” benefitted financially through “participation in a [trafficking] venture” (defined as, “knowingly assisting, supporting, or facilitating” someone who “knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes or solicits by any means a person”), (2) “knowing . . . means of force, threats of force, fraud, or coercion will be used to cause the person to engage in a commercial sex act, or knowing that the person has not attained the age of 18 and will be caused to engage in a commercial sex act.” This would raise several questions:

- a. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the specific plaintiff was engaged in commercial sex?
- b. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the specific plaintiff was forced or coerced to engage in commercial sex?
- c. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the individual advertised on the site was a minor?
- d. Does the “knowledge” standard require the website specifically know the individual is underage, either by self-reporting or some other means?
- e. Does the website “know” a minor is being trafficked if the ad includes code words, such as “New in Town” or “Fresh,” or a photo that appears to depict someone underage?
- f. Does the website “know” it is benefitting financially through knowingly assisting in a [trafficking] venture simply by hosting an “escort” advertisement of an individual in the ad who is later found to be a minor?
- g. Does the website “know” it is benefitting financially through knowingly assisting in a [trafficking] venture simply by hosting an “escort” advertisement of an adult who is later found to have been forced/coerced to engage in commercial sex?
- h. Does the website “know” it is facilitating commercial sex transactions simply by hosting an “escort” ad?

A wealth of evidence against Backpage.com has been discovered over the past year, and while it might now be possible, though still incredibly difficult, to prove that Backpage.com “knowingly” assisted in a sex trafficking violation, it is not possible to gather this level of evidence for the hundreds of other websites that are profiting from the sex trade. Because of these legal realities, prosecutors across America have told me that any legislation that depends exclusively on the “knowingly” *mens rea* standard to hold websites accountable will merely be a Washington, D.C., “feel good” exercise.<sup>8</sup> Congress might pat itself on the back, but local prosecutors won’t be able to ensure that bad actor websites do not facilitate the sale of victims. This is why FOSTA is built around the reckless disregard *mens rea* standard that prosecutors and victims need to have a meaningful chance at success. We must find a creative way to maintain the reckless disregard standard or at the very least, not raise the very high bar that victims and prosecutors must already meet in the federal criminal code. House efforts must complement and enhance the steps the Senate Commerce Committee has taken.

I have spoken with local prosecutors across the country who have asked the House of Representatives to pass a practical solution that will allow them to take predatory websites off the internet. I believe that every victim has a right to use their private rights of action, at both the federal and state levels, and I am beyond thrilled that *J.S. v. Village Voice Media Holdings* provided a successful case study in how to prosecute bad actor websites. But in order to help as many victims as possible, to prevent victimization in the first place, and to enable the success of more civil cases, we need more state and local prosecutions. A group of law professors weighed

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<sup>8</sup> Indeed, the “knowingly” *mens rea* standard has inadvertently made it *more* difficult to bring cases, both criminal and civil, than the original 1591 text allows for. The Committee must pay particular attention to prosecutors and lawyers who will be impacted by this standard.

in on the need to enhance state criminal enforcement in a recent [blog post published](#) by Shared Hope International:

Sex trafficking, like all social problems, requires a comprehensive response from many quarters: the criminal law, civil law, business regulations, etc. These mechanisms are necessary to deter, prevent, and when prevention fails, punish trafficking or facilitating the trafficking of people. For many crimes we look to federal, state, local, civil, criminal, medical, and educational institutions to respond. Human trafficking is no different.

There is an important aspect of federal prosecution that is worth mentioning here: federal prosecution is discretionary. Because of the limited resources of the federal government, federal prosecutors do not and cannot take every case. They select certain cases to handle based on a variety of factors. Most criminal charges, therefore, take place on the local and state level. For example, although it is a federal crime to distribute narcotics, the Department of Justice does not handle every narcotics case. Rather, it selects a small number of cases, leaving the primary job of prosecuting these crimes to the states...

The problem of human trafficking is massive. This is an extremely lucrative criminal enterprise with many tentacles. One of the reasons human trafficking is growing so rapidly is the large role the internet plays in its execution. We need many pressure points to contain and eradicate this form of victimization on both the state and federal level. Indeed most of the prosecution of criminal cases of human trafficking is based on state laws.

Furthermore, states have the right – indeed the obligation – to protect their citizens. Since the founding of our nation, there have been many sources of criminal law for all forms of victimization. States have their criminal codes for crimes that state legislatures see affecting their citizens. The federal criminal code addresses federal crimes and these are forms of victimization that the United States Congress has identified as crimes with a federal interest. While some crimes just have a federal interest – treason for example, most crimes are local and the federal government chooses to supplement the state criminal laws, not replace them...<sup>9</sup>

If we are serious about helping victims, we must be serious about creating laws that allow for robust state and local criminal enforcement. Criminal enforcement means businesses will stay out of the illegal sex trade; fewer vulnerable people will ever become victims; demand will be reduced; and civil suits will be easier to bring. There is tremendous momentum to pass a bill that prevents the exploitation of trafficking victims, deters criminal conduct, and incentivizes practices that will reduce online sex trafficking. Indeed, Congress has a moral obligation to shut down these websites.

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<sup>9</sup> Mary G. Leary, Shea Rhodes, Chad Flanders, and Audrey Rogers, "Law Professors Weigh in on Amending the CDA – Part 1," <https://sharedhope.org/2017/09/law-professors-weigh-amending-cda-part-1/>, (September 14, 2017).

I am committed to collaborating with this Subcommittee, the House Judiciary Committee, House Leadership, and the Senate to end the online trafficking industry in America, and I will work with you to mark up a forward-facing bill (or bills) that will provide justice to victims of all bad actor websites, not just Backpage.com. I adamantly believe we can pass bipartisan House legislation that includes meaningful tools to prevent future victimization. Together, the 115<sup>th</sup> Congress can hold online marketplaces accountable for facilitating the sale of our most vulnerable.

Thank you.

Mrs. BLACKBURN. The gentlelady yields back.

We thank you so much for your remarks and your well wishes that we will move forward.

At this time, we will briefly recess long enough to put the new nameplates up, and we will welcome our panel to the table.

[Recess.]

Mrs. BLACKBURN. At this time, we welcome our second panel of witnesses: Yiota Souras, who is the senior VP and general counsel for the National Center for Missing and Exploited Children; Ms. Derri Smith, CEO of End Slavery Tennessee; Mr. Russ Winkler, assistant special agent in charge at the Tennessee Bureau of Investigation; and Mr. Eric Goldman, a professor at Santa Clara University School of Law.

Welcome to each of you. We appreciate that you are here today.

We are going to begin our testimony with you, Ms. Souras.

Each of you will have 5 minutes. I ask that you move the microphone to you, touch the button in the center so that you activate it. And at the end of your 5 minutes, we will begin the questioning portion of this hearing.

Ms. Souras, you are recognized for 5 minutes.

**STATEMENTS OF YIOTA G. SOURAS, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN; DERRI SMITH, CHIEF EXECUTIVE OFFICER, END SLAVERY TENNESSEE; RUSS WINKLER, SPECIAL AGENT IN CHARGE, TENNESSEE BUREAU OF INVESTIGATION; AND ERIC GOLDMAN, PROFESSOR, SANTA CLARA UNIVERSITY SCHOOL OF LAW**

**STATEMENT OF YIOTA G. SOURAS**

Ms. SOURAS. Thank you.

Chairman Blackburn, Ranking Member Doyle, and members of the committee, I am honored to be here today on behalf of the National Center for Missing and Exploited Children and to join this discussion to ensure that America's most vulnerable victims—children trafficked online for rape and sexual abuse—have opportunities for justice against their traffickers, including those who participate in trafficking them online.

I would like to thank Congresswoman Wagner for her long-standing dedication to child sex trafficking victims and her tireless work to create meaningful change for these survivors.

As part of our work as the congressionally designated resource center on missing and exploited children, NCMEC receives approximately 9,800 reports of child sex trafficking every year. Over the past 5 years, 88 percent of these reports have involved a child being trafficked online. More than 74 of these reports from the public relate to an ad on Backpage.

In recent years, we have learned an enormous amount about the complexity, ruthlessness, and profitability of the sale of children for sex online. But we have also seen courts struggle and fail to hold websites liable for facilitating sex trafficking. Today, we are at a crossroads on how best to proceed with legislation that combats this heinous crime.

Courts have been able to find their way around the current application of the CDA, a statute that is over 21 years old and has created broad immunity, even for websites that support online child sex trafficking. These courts have called on Congress to clarify that all facilitators of online sex trafficking, including websites, are not legally protected.

The House of Representatives and the Senate have worked on parallel tracks to develop bills that respond to the recent court decisions and reconcile the CDA with protections granted to victims under the Federal trafficking statute.

We believe these bills address the specific legal barriers faced by child sex trafficking victims and coalesce around three legislative solutions: first, ensuring that State attorneys general have the authority to protect children in their own States and can bring criminal and civil actions against online entities that participate in sex trafficking; second, clarifying that sex trafficking victims can pursue civil remedies against everyone who participates in their trafficking, including websites; and, third, defining participation in a trafficking venture under Federal law as assisting, supporting, or facilitating sex trafficking.

These broad legislative solutions specifically respond to what courts have called on Congress to do: provide children with access to justice and hold websites that facilitate sex trafficking responsible.

NCMEC has assisted tens of thousands of children victimized by online sex trafficking. Behind the current debate about the particular details and standards within the legislative proposals are horrific experiences suffered by these children, who are defenseless against predators selling them for rape and sexual abuse online.

NCMEC has worked closely with many sex trafficking victims whose cases have been dismissed due to the current broad interpretation of the CDA's immunity. We have witnessed the anguish of these children's recovery and have heard their hopelessness when courts dismiss their cases against websites that facilitated their trafficking.

Victims who have been denied justice due to the CDA include a 14-year-old girl who was trafficked online for 2 years and advertised in sexually explicit poses; two 15-year-old girls, one who was raped over 1,000 times while trafficked online for just over a year and a second girl who was trafficked online for 2 years and sold to from 5 to 15 customers a day.

Cases like this remind us of the ongoing suffering of victims and the urgency to move forward with current legislation that addresses past cases and has broad support from all key stakeholders, including the tech sector. NCMEC believes that legislation that includes the three core solutions outlined more fully in my written testimony will provide powerful tools to ensure the rights of child victims while protecting current law that encourages a robust internet.

Chairman Blackburn, we couldn't agree with you more when you said in yesterday's Knox News that standing by idly is simply not an option. It is time that we hold companies accountable for their actions when they cross the line. We have been encouraged by the Senate's legislative progress on FOSTA, including the support of

the Internet Association and Facebook, and are hopeful that under your leadership a similar path forward can be accomplished here in the House.

In conclusion, we stand ready to assist the committee so that at the end of the day a bill can move expeditiously to the President's desk for enactment into law.

Thank you.

[The prepared statement of Ms. Souras follows:]



**Statement by  
Yiota G. Souras, Senior Vice President and General Counsel  
The National Center for Missing and Exploited Children**

**“Latest Developments in Combating Online Sex Trafficking”  
November 30, 2017**

**Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
United States House of Representatives**

Chairman Blackburn, Ranking Member Doyle, and Members of the Committee, I am honored to be here today on behalf of The National Center for Missing and Exploited Children (NCMEC) and to join this discussion regarding how we can best ensure that our nation’s most vulnerable victims – children trafficked online for rape and sexual abuse – are provided with adequate legal protections and opportunities for legal recourse. We are deeply appreciative of the intense legislative activity undertaken this past year to consider how best to combat child sex trafficking, a devastating crime that continues to expand tremendously as a viable online business model.

Today, we are at a crossroads on how best to proceed with legislative remedies to combat this heinous crime of online sex trafficking. We have learned an enormous amount over the past few years about the complexity, ruthlessness, profitability, and massive scale of the sale of children for sex online. At the same time, we have witnessed courts struggle, and fail, to provide child sex trafficking victims with effective legal redress or to hold online entities legally responsible for facilitating sex trafficking. Courts have been unable to find their way around the barriers created by an overly broad application of the Communications Decency Act (CDA), a statute that is over two decades old and has created virtually absolute immunity for online entities, even those actively engaged in trafficking children for sex.

Today, state Attorneys General cannot prosecute websites that facilitate the sex trafficking of children in their own state. And child victims cannot use the private right of action specifically granted to them by Congress to seek their own civil remedies against an online entity that participated in their sex trafficking.

Over the past few months, the House of Representatives and the Senate have worked on parallel tracks to address these judicial outcomes and to reconcile the CDA with the protections Congress granted sex trafficking victims under the Trafficking Victims Protection Reauthorization Act (TVPRA).



Here in the House of Representatives, Congresswoman Ann Wagner of Missouri has continued her longstanding dedication to protecting the rights of child sex trafficking victims by introducing her landmark bill, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) (H.R. 1865) which currently has 171 cosponsors and support from numerous law enforcement and advocacy groups. NCMEC joins the dozens of survivors, their families, and other child advocates who applaud her tireless work to create meaningful change for online trafficking victims.

In the Senate, Senator Rob Portman, building off his leadership on the groundbreaking investigation of online sex trafficking by the Senate Permanent Subcommittee on Investigations, introduced the Stop Enabling Sex Traffickers Act of 2017 (SESTA) (S. 1693), which NCMEC has endorsed. SESTA passed unanimously out of the Senate Commerce Committee earlier this month, and now more than half the Senate has cosponsored the bill. NCMEC is especially pleased that its valued partners from the technology industry, including the Internet Association and Facebook, have joined NCMEC, other advocacy groups, and several Fortune 500 companies to endorse SESTA, which is now poised for a vote on the Senate floor.

By focusing on the specific legal barriers facing child sex trafficking victims, the efforts of both the House and the Senate have coalesced in consensus around three broad legislative initiatives:

First, ensuring that state Attorneys General are empowered to protect their most vulnerable citizens by granting them the authority to bring criminal and civil actions against online entities that assist, support or facilitate human sex trafficking;

Second, clarifying that sex trafficking victims can utilize the private right of action granted to them by Congress to pursue civil remedies against everyone who participates in their trafficking, including websites and other online entities; and

Third, defining participation in a trafficking venture under the federal criminal statute as assisting, supporting or facilitating human sex trafficking.

These core legislative solutions specifically address the legal impediments that currently foreclose access to justice for child victims and permit online entities to facilitate the trafficking of children for sex on the internet with impunity. NCMEC has been encouraged by the commitment from House and Senate members, law enforcement, advocacy organizations, and the tech community to prioritize protecting our children with their support of these core legislative solutions.

#### **NCMEC History**

NCMEC was created in 1984 by John and Revé Walsh and other child advocates as a private, non-profit organization. NCMEC serves to provide a coordinated, national response to missing and exploited children and works with families, victims, private industry, law enforcement, and the

public to help prevent child abductions, recover missing children, and provide services to deter and combat child sexual exploitation.

More specifically to today's hearing, NCMEC serves as a national clearinghouse for reports relating to child sex trafficking, making NCMEC uniquely situated to assist law enforcement, first responders, and victim specialists on the identification, location, recovery, and support of child victims. NCMEC has provided support to tens of thousands of identified child victims and their families through reports from parents, law enforcement, technology companies, and the general public to our CyberTipline and 24-hour hotline (1-800-THE-LOST).

### **Online Child Sex Trafficking**

Child sex trafficking is a pervasive and underreported crime. Every year, thousands of children from across the United States are trafficked, sold for sex, repeatedly raped, and suffer traumatic physical, sexual, and emotional abuse. NCMEC has worked on child sex trafficking cases in every state in the country.

Child sex trafficking involves the rape or sexual abuse of a child in exchange for something of value. There is no legal protection for selling, facilitating the sale of, or benefiting financially from the sale of a child for rape or sexual abuse. There is no situation in which child sex trafficking could be considered legal or consenting sexual activity between adults.

Technology has fundamentally changed how children are victimized through sex trafficking in ways that would have been unimaginable just a few years ago. An adult can now shop from the privacy of his home, office or hotel room, often on a cell phone, to buy a child for rape. Traffickers lure and recruit children online. Websites can create virtual marketplaces on which predatory offenders can peruse a variety of sexual experiences being offered for sale, including with children, and complete their purchase online.

NCMEC operates the CyberTipline to provide the public and electronic service providers with an efficient means of reporting incidents of suspected child sexual exploitation, including child sex trafficking. Over the past five years, NCMEC has received an average of 9,800 reports relating to child sex trafficking every year. We believe the reports made to NCMEC reflect only a small fraction of the much larger number of children trafficked online each year. There is no mandatory requirement to report instances of child sex trafficking to NCMEC. In addition, not all children who are trafficked are reported missing. Some have been forced out of their homes. Some are not missing at all – children can be trafficked while still living at home, with the Internet providing an easy and highly accessible platform for potential predators to find and exploit them.

The crime of child sex trafficking has increasingly expanded to the internet. Traffickers have learned that by leveraging the power of the internet, they can more easily recruit, control, and sell children for sex. Some website operators have also recognized the enormous profitability of creating online platforms to facilitate the sale of adults and children for sex.

Over the past five years, **88%** of NCMEC's reports regarding child sex trafficking relate to the trafficking of a child online. Further, more than **74%** of reports relating to child sex trafficking made by members of the public to NCMEC concern an advertisement on Backpage. This trend will continue so long as online classified advertising websites are able to facilitate and support the sex trafficking and commercial sale of children for sex to a range of online customers.

At NCMEC, we are confronted daily with the reality that children are sold for sex online. Under current law, these crimes can be committed with virtual impunity by websites that facilitate the sex trafficking of a child. In case after case, child sex trafficking victims are unable to have their voices heard and are deprived of their day in court against online entities that supported their trafficking.

The legislative solution needed at this time is a narrow clarification to existing laws that will enable courts to find their way around current judicial barriers and ensure that child victims have full rights to seek redress for their harm. Multifaceted legal resources also must be brought to bear against online facilitators of sex trafficking. While federal prosecution of online trafficking facilitators is not barred, state Attorneys General and private attorneys must be part of the legislative solution moving forward to ensure child victims have adequate legal routes to seek redress and federal prosecutors have adequate support to combat the growing volume of online sex trafficking crimes.

#### **The Experiences of Child Sex Trafficking Victims Highlight the Need for Action on Current Legislative Solutions**

Over the past seven years, over 20 legal cases have been filed involving Backpage, many brought by children seeking justice against Backpage for facilitating their sex trafficking online. Time and time again in these cases, courts have acknowledged the horror of the allegations made regarding the child victims' trafficking, but held themselves powerless to act under the CDA.

The child sex trafficking victims who have been denied justice by courts due to the CDA include:

- A 14-year old girl trafficked online for two years and advertised in sexually exploitive poses with photos of her private body parts.
- A 15-year old girl raped over 1,000 times while trafficked on Backpage for just over a year.
- A 15-year old girl trafficked for two years on Backpage with an average of five to fifteen customers a day.

Unfortunately, these victims are not unique. NCMEC has managed tens of thousands of cases of children bought and sold for sex through online advertisements. The prevalence and lurid horror of these advertisements cannot be underestimated. It is essential to understand that the current debate regarding legislative options emerges from the horrific experiences suffered by children who are defenseless against predators who seek to commercialize them for sex online.

Two cases reported to NCMEC earlier this year underscore the helplessness and sheer brutality suffered by children who are trafficked for sex:

1. A child went missing from the custody of social services in Arkansas and was reported to NCMEC. A few months after the child went missing, she was able to text her sister to say that she was being held by men with guns in a house that had bars on the windows. She told her sister she was scared. After five months, the child was recovered – she had been brutally beaten, sexually trafficked on Backpage across three states, and tested positive for multiple sexually transmitted diseases.

After she was recovered, the child, who was 14 years old, reported that she had run away because she was “looking for someone to care about her.”

2. A 15-year-old child went missing from the custody of social services in Illinois and was reported to NCMEC. The child was lured to a house by a 25-year-old man who forced her to take cocaine and meth, raped her, and then trafficked her for sex to several different men. The child was recovered four days later after a member of the public alerted law enforcement to seeing the child on the train tracks talking to herself.

After being recovered, the child reported that after escaping from her trafficker she had gone to the train tracks to commit suicide by getting hit by a train.

These cases remind us of the ongoing suffering by child sex trafficking victims that the current legislative initiatives are designed to address and underscore the urgency of moving forward.

#### **The Courts’ Struggles to Reconcile Federal Trafficking Law and the CDA**

Congress has protected children from being trafficked for sex by enacting the TVPRA. The TVPRA establishes human trafficking as a federal crime and recognizes the unique vulnerability of children to trafficking by imposing severe penalties on anyone who knowingly recruits, harbors, transports, provides, advertises or obtains a child for a commercial sex act or who benefits financially from such activity. Every state has an equivalent statute that state prosecutors can use against those who traffic children for sex. These laws have been used effectively to prosecute traffickers who conduct their business on the streets, in hotels, casinos or at truck stops. Brick and mortar businesses, such as hotels, that have facilitated child sex trafficking are also not immune from similar criminal prosecution. However, these laws have proven futile to protect children against websites that participate in ventures to sell children for sex due to the courts’ interpretation of the CDA.

The CDA was enacted by Congress in 1996 to protect online companies from liability when they host third party content or engage in good faith efforts to regulate harmful material on their platforms. Unfortunately, courts have proven unable to reconcile the purpose of the immunity provided by the CDA with the mission of the TVPRA to criminalize the sex trafficking of children.

This legal conflict has been building for years. The most frequent result is that children who have suffered undeniable and unimaginable harm, are completely barred from seeking judicial relief against online entities that facilitated their trafficking. As a further complication, courts have been uncertain on what it means to benefit from participating in a trafficking venture under the TVPRA, which is a crucial element to proving a trafficking claim against a website.

For years, Backpage has been one of the largest facilitators of online sex trafficking ads, and as a result it has been the focus of civil, criminal, and legislative efforts to curtail online sex trafficking. Backpage has shown that children can be trafficked for sex online through a functionally simple and wildly lucrative website, while courts have demonstrated that a legal loophole exists enabling this type of website to be immune from liability under the CDA.

NCMEC is aware that children are trafficked for sex on many websites in addition to Backpage. If Backpage ultimately is shut down due to the pending legal actions, another website or multiple other websites will surely fill the marketplace that Backpage currently dominates. The narrow legislative goals currently under discussion are intended to make certain that the next generation of online platforms that assist, support, or facilitate child sex trafficking will not receive the blanket protection of the CDA's immunity.

NCMEC is fundamentally aware that combatting child sex trafficking is a multi-faceted problem, and the legislative initiatives presented by FOSTA and SEXTA will not end online child sex trafficking. No single solution can accomplish this. But this legislation will provide essential tools to guarantee legal rights to child sex trafficking victims and ensure that websites that participate in the trafficking of a child are not legally immune for their crimes.

#### **Courts Call on Congress to Clarify the CDA's Impact in Child Sex Trafficking Cases**

Courts have become increasingly aware that children are without legal recourse, and state prosecutors foreclosed, when an online website, rather than a brick-and-mortar operation, facilitates a trafficking venture. Both criminal and civil courts have consistently called on Congress to clarify that there is no legal protection for those who facilitate the online sex trafficking of children.

Last year, the Sacramento Superior Court dismissed criminal pimping charges against Backpage, while recognizing the vital issues at stake:

[T]he Court understands the importance and urgency in waging war against sexual exploitation. Regardless of the grave potential for harm that may result in the exercise of this article of faith, Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

Also last year, the First Circuit Court of Appeals dismissed trafficking charges in a civil case against Backpage after recognizing the failure of the statutes to provide an adequate means to protect children and hold online sex traffickers liable because of the CDA:

This is a hard case — hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage. . . The appellants’ core argument is that Backpage has tailored its website to make sex trafficking easier. Aided by the amici, the appellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through values that drive the CDA, the remedy is through legislation, not through litigation.

Earlier this year, the Sacramento Superior Court again dismissed criminal pimping charges against Backpage and bluntly assessed its view of the current state of the law to immunize a website from online sex trafficking:

If and until Congress sees fit to amend the immunity law, the broad reach of section 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.

**NCMEC Supports Legislative Options that Resolve Current Barriers to Adequate Legal Remedies for Child Sex Trafficking Victims**

NCMEC has worked closely with children victimized by online sex trafficking, their families and private attorneys, and prosecutors in many of the cases where child sex trafficking claims have been dismissed under the courts’ interpretation of the CDA. Through our work, we have witnessed the anguish of their recovery and the long-lasting trauma their families suffer. We also have heard their hopelessness when their legal efforts to hold responsible websites that facilitated the crimes against them are dismissed by the court.

Congress has now heard these children’s voices as well and is moving forward with parallel proposals in the House and Senate to address specific impediments raised by recent court cases. As outlined above, courts have uniformly recognized that the CDA lacks clarity when applied to modern crimes of online sex trafficking and the pernicious monetization of children trafficked for sex on websites, such as Backpage.

The goals of the proposed legislation by Congresswoman Wagner, Senator Portman and their many cosponsors are sufficiently narrow to help ensure justice for child sex trafficking victims and clarify that civil attorneys and state Attorneys General can actively help victims seek legal

recourse against online entities that participate in their trafficking. The three core legislative solutions are directly responsive both to extensive congressional findings regarding Backpage's facilitation of online child sex trafficking and the repeated failure of courts to allow state prosecutors and child victims to have their day in court.

After a multi-year investigation into Backpage and its principals, the California Attorney General's Office twice filed charges of pimping a minor against the owners of Backpage. Attorneys for Backpage asserted that the CDA barred the pimping charges. The Sacramento Superior Court agreed and dismissed the pimping charges in both cases holding the charges were barred because Backpage was immune under the CDA.<sup>1</sup> The Missouri Attorney General's office also has attempted to use its state law to investigate sex trafficking on Backpage's website by recently serving a civil investigative demand for information from Backpage. Backpage promptly sought injunctive relief to block the investigation, claiming that the CDA protects all websites from state civil or criminal claims.

The first legislative solution presented by FOSTA and SESTA addresses these legal outcomes by ensuring that state Attorneys General are empowered to bring criminal and civil actions against online entities that assist, support or facilitate sex trafficking. This is an essential legislative remedy that would enable state Attorneys General to prosecute websites that traffic children in their state<sup>2</sup> and also would provide much needed resources to assist federal prosecutors in handling the tremendous volume of online sex trafficking crimes.

A recent First Circuit appellate decision held that even a website tailored to facilitate child sex trafficking through a "meretricious business model" is immunized from liability for its criminal sex trafficking activity due to the CDA.<sup>3</sup> The court in this case held that Congress did not "sound an uncertain trumpet when it enacted the CDA," and the law sided with online entities and publishers over child sex trafficking victims. In dismissing the victims' case, the court effectively nullified the statutory right Congress granted to sex trafficking victims to pursue civil cases against their traffickers.<sup>4</sup>

The second legislative solution presented by FOSTA and SESTA restores the statutory private right of action to child sex trafficking victims by clarifying that they can pursue civil remedies against everyone who participates in their trafficking, including websites and online entities.

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<sup>1</sup> *People of the State of California v. Carl Ferrer et al.*, Court's Final Ruling on Demurrer (Cal. Sup. Ct. Dec. 9, 2016); *People of the State of California v. Carl Ferrer, et al.*, Ruling on Defendants' Motion to Dismiss (Cal. Sup. Ct. Aug. 23, 2017).

<sup>2</sup> California Attorney General Becerra testified before the Senate Commerce Committee that almost every sex trafficking case in his office involves online sex trafficking. (Statement of Attorney General Xavier Becerra to Senate Committee on Commerce, Science, and Transportation) (Sept. 19, 2017).

<sup>3</sup> *Doe v. Backpage.com LLC*, 817 F.3d 12 (1st Cir. 2016).

<sup>4</sup> *Id.* (effectively nullifying remedy under 18 U.S.C. § 1595).

The First Circuit appellate decision also rejected the child victims' claims that Backpage had violated the federal criminal trafficking statute by benefiting financially from its "participation in a venture" relating to their trafficking. The court expressed uncertainty regarding how to evaluate whether a website had participated in a venture through online activity. Because a website's activity relating to trafficking most often will arise from participation in a venture, rather than the direct transportation, provision, or solicitation of a person for trafficking, clearly defining this term for courts is essential to provide a viable judicial remedy to victims.

The third legislative proposal presented by FOSTA and SESTA defines "participation in a venture" as assisting, supporting, or facilitating human sex trafficking. This clear definition would provide the courts with a firm standard by which to judge the actions of a website when sex trafficking civil claims or criminal charges are asserted.

### **Conclusion**

I would like to thank you for the opportunity to provide the Committee with an overview of NCMEC's work in combating online child sex trafficking. As the nation's clearinghouse on missing and exploited children issues, our priority is to protect the interests of children victimized by sexual exploitation. We believe legislation that addresses the three core legislative solutions as outlined in my testimony would provide powerful tools to protect and expand the rights of child victims consistent with NCMEC's mission while protecting the current law that encourages a healthy and robust internet.

We have been very encouraged by the Senate's legislative process on SESTA as they have worked to engage with all involved parties, including survivors, advocates, and the technology community. Each party came to the table after voicing its views and reached a compromise enabling an amended version of SESTA to move unanimously out of the Senate Commerce Committee.

We are hopeful that under your leadership a similar path forward can be accomplished here in the House of Representatives. We stand ready to assist the Committee as you continue to consider proposals to combat this heinous crime so that at the end of the day, a bill can move expeditiously to the President's desk for enactment into law. We look forward to continuing to work with you on these very important issues.



Mrs. BLACKBURN. The gentlelady yields back.  
 Ms. Smith, you are recognized for 5 minutes.

#### STATEMENT OF DERRI SMITH

Ms. SMITH. Chairman Blackburn, Ranking Member Doyle, and members of the subcommittee, thank you for holding a hearing on this important topic. It is an honor to offer testimony on the impact of technology on human trafficking victims and survivors.

The sexual exploitation perpetrated against women, men, boys, and girls in the commercial sex industry is found all across the internet. There is no place for a survivor of human trafficking to hide, because their victimization is already on display for all to see. The public victimization exponentially complicates the healing process.

In the early days of this work, I met two girls from Atlanta. They were deceived by a girl they thought was their friend, held by child safety locks, and driven to Nashville by their trafficker. The trafficker got a hotel room, popped an ad up online, and was in business within half an hour. I was struck with how easy it was for him to sell those girls, as easy as advertising a bicycle or a car for sale. I was also struck with how quickly men arranged to have sex with these young people, as fast as ordering a pizza.

In my years since, I have heard hundreds of variations of this story. At least three out of four of the survivors we serve were advertised online, and others were recruited and groomed online.

Thankfully, an undercover detective was answering online ads that day posing as a john. He came to the girls' room and ended their exploitation within days of its start. They were the lucky ones.

Once recovered, survivors still face threats from predators online who are waiting for them to surface. Especially in the early days of survivor recovery, our efforts to monitor online activity are more challenging than simply monitoring phone usage. There are temptations, dangers, and master manipulators ready to entice survivors back into exploitation.

When the Tennessee Bureau of Investigation began proactively attacking human trafficking, they called End Slavery Tennessee for assistance. First, they wanted to understand the technology landscape and how it affected victims. How were victims recruited, bought, and sold across the internet? They needed firsthand information, and one of our young survivors was willing to tell them all she knew about being trafficked online.

Secondly, the TBI wanted a more direct partnership during the undercover operations. That meant our survivor intervention specialist and case manager were on site during the operation. When TBI identified a victim, she met with End Slavery Tennessee staff. These young women were offered services and a way out of exploitation that very day. Some took the offer; others did not. But they did understand that the offer did not have an expiration date. The goal was to turn that scary and often negative interaction with law enforcement into one of hope.

Once a survivor comes to End Slavery Tennessee, the plan of care often depends on drug addiction, prior victimization, length of time enslaved, and the age of the victim. We have provided care

and services to survivors from the age of 4 to 52, with a primary focus on minors through age 25, and in eight languages.

In the past 5 years, we have gone from operating out of one 10-by-10-foot office to a small suite of offices and now to a care center and three safe houses. We currently care for about 190 survivors a year in Nashville and the surrounding area.

Survivors need a plethora of wraparound services to meet their every need. Because trafficking victims suffer complex post-traumatic stress disorder, the restorative process can and usually does take years. To compound the trauma of trafficking, most victims were abused as children or suffer from a range of other adverse childhood experiences that made them vulnerable to exploitation in the first place. It is essential that an agency offer case management and a comprehensive array of specialized services until a survivor is ready to lead a productive and stable life.

In Tennessee, we use a single-point-of-entry model, with one agency in each of the four regions of the State whose entire focus is on providing intensive case management and restoration of victims. Together, we form the Tennessee Anti-Slavery Alliance. This approach ensures that quality, consistent trauma-informed services are provided statewide in the most effective and efficient way possible and that victims don't fall between the cracks.

Thank you for this opportunity to address the committee, and I will welcome your questions later.

[The prepared statement of Ms. Smith follows:]



Derri Smith  
CEO, End Slavery Tennessee  
Before the  
Subcommittee on Communications and Technology  
United States House of Representatives  
Hearing entitled  
“Latest Developments in Combating Online Sex Trafficking”  
November 30, 2017

Chairman Blackburn, Ranking Member Doyle, members of the Subcommittee, thank you for holding this important hearing. It is an honor to offer testimony on the impact of technology on human trafficking victims and survivors. The short answer is that technology compounds, exposes and illuminates the victimization and violence against trafficking victims. The sexual exploitation perpetrated against people in the commercial sex industry is all across the internet. There is no place for survivors of human trafficking to hide, because their victimization has been put on display for the world to see. That public victimization exponentially complicates the healing process.

Years ago, I met two teenage girls from Atlanta. They were deceived by a girl they thought was a friend, ended up with a trafficker, in a car with child safety locks, and driven to Nashville. This

**Derri Smith testimony**

man got a hotel room, popped an ad up online and was in business within half an hour. I was struck with how easy it was for him to sell girls— as easy as advertising a bicycle or car for sale. I was struck with how quickly men arranged to have sex with young people—as fast as ordering a pizza. In the ensuing years, I've heard variations of this story hundreds of times. Three out of four survivors we serve have been advertised online. Others have been recruited and groomed on-line.

Thankfully, an undercover detective was answering online ads that day, posing as a John. He came to the girl's room and ended their exploitation within days of its start. They were the lucky ones. Once recovered, survivors face threats from predators online who are waiting for them to surface. Especially in the early days of recovery, monitoring online activity is more challenging for us than monitoring phone usage. There are temptations, dangers and master manipulators ready to entice victims back with the promise of a dream that becomes a nightmare.

When the Tennessee Bureau of Investigation (TBI) began a proactive attack on human traffickers, they called us at End Slavery Tennessee for assistance. That partnership had two initial prongs. First, they asked for help in understanding the technology landscape and how it affected trafficking victims. How were victims recruited, bought and sold across the internet? They needed first-hand information, and one of our young survivors was willing to tell them all she knew about being trafficked online.

Second, the TBI wanted a more direct partnership during the undercover operations. That meant our survivor intervention specialist and case manager were on site during operations. When TBI identified a victim, she met with End Slavery Tennessee staff. These young women were offered services and a way out of exploitation. Some took the offer, some did not. They left with the

**Derri Smith testimony**

understanding that the offer didn't have an expiration date. The goal was to turn that very scary and often negative interaction with law enforcement into one of hope.

Once a survivor comes into care at End Slavery Tennessee, the plan of care often depends on drug addiction, prior victimization, length of time enslaved and the age of the victim. We have provided care and services to survivors from four to fifty-two years old, with a primary focus on minors through age twenty-five, and in eight languages. In the past five years, we have gone from operating out of one ten-by-ten foot office to a small suite of offices, to now a Care Center and three safe houses. We currently care for about 190 survivors per year in Nashville and the surrounding area.

Survivors need a plethora of wrap around services to meet their every need. Because trafficking victims suffer complex post-traumatic stress disorder, the restorative process can last years. To compound the trauma of trafficking, most victims were abused as children or suffered from a range of other adverse childhood effects which made them vulnerable to exploitation in the first place. It is essential that an agency offer case management and a comprehensive array of specialized services until a survivor is ready to lead a stable and productive life.

In Tennessee, we use a single point of entry model, with one agency in each of the four regions of Tennessee whose entire focus is on providing intensive case management and the restoration of human trafficking victims. Together, we formed the Tennessee Anti-Slavery Alliance. This approach ensures that quality, consistent, trauma-informed services are provided statewide in the most effective and efficient way possible and that victims don't fall between the cracks, as often happens when systems of communication and collaboration are not in place. Survivors shouldn't have care options only in our large cities. We should meet their needs wherever they are.

**About End Slavery Tennessee**

The mission of End Slavery Tennessee is to promote healing of human trafficking survivors and strategically confront slavery in our state with a vision to create a slave-free Tennessee. To accomplish this, we use the T.A.A.P. method. This method includes focus by End Slavery on Training, Aftercare, Advocacy and Prevention.

**Training** - As experts in the field we train over 11,000 professionals and community members each year, equipping first responders to identify victims of human trafficking and have a broader sphere of influence in their field.

**Aftercare** - We provide all survivors of any kind of human trafficking long term, comprehensive, specialized, trauma-informed aftercare through both in- house services and other community service providers.

**Advocacy** – We work successfully on the local, state and national level to create effective collaboration and communication; accomplishing systemic change and influencing policy and laws.

**Prevention** – We facilitate specialized groups to keep vulnerable youth safer, address the demand through interactive curriculum and equip the general population through innovative strategies and resources to prevent exploitation.

More information can be found at [endslaverytn.org](http://endslaverytn.org).

Mrs. BLACKBURN. The gentlelady yields back.  
Mr. Winkler, you are recognized for 5 minutes.

#### STATEMENT OF RUSS WINKLER

Mr. WINKLER. Thank you.

Chairman Blackburn, Ranking Member Doyle, members of the subcommittee, thank you for inviting me today. I am a special agent in charge with the Tennessee Bureau of Investigation and co-director of the Tennessee Fusion Center. One of my responsibilities is to oversee human sex trafficking investigations.

Since 2011, thanks to our general assembly, our Governor, and my boss, TBI Director Mark Gwyn, we have been given better tools to combat this disgusting crime. We are proud that, this year, Tennessee ranked number one on Shared Hope International's State report card, and that is due in large part to the sustained focus of our State leadership.

As I sit here talking with you, I am overseeing 66 active human sex trafficking investigations with minor victims in big cities and small towns across Tennessee. In most of these cases, a sex trafficking perpetrator takes a child and forces, threatens, or coerces her—the victim is nearly always female—to engage in sex acts for money. In our experience, most cases involved the posting of ads for underage sex on Backpage.com, though Backpage is not the only site.

To identify people seeking to engage in commercial sex acts with underage females, we use young-appearing female law enforcement officers to post ads online offering sex acts. We seed these ads with terms like “new to town” that are code in that environment for underage females. The undercover agents establish that they are under 18 in phone and text conversations with potential johns. All have been men so far in our investigations.

Numerous men are not deterred by their juvenile status and eventually show up at the hotels, where we set up encounters with undercover agents. The agents meet with the men in a hotel room and, again, engage in conversation that proves that the offenders think that they are underage. Money is given to the undercover agents, and the men are promptly approached by uniformed law enforcement officers, who are waiting in the next room.

For us, this is, unfortunately, a routine operation. The demand is staggering, and we know we are not unique among States. Our most recent undercover operation in a Nashville suburb resulted in 21 men being apprehended over a 3-day period when they came to a hotel room to engage in sex acts with undercover female agents who they believed were juveniles.

To target traffickers of underage girls, we use male undercover TBI agents posing as johns. Our undercovers respond to advertisements that our Fusion Center intelligence analysts find on Backpage.com. Our analysts use advanced software called Spotlight to help identify ads that have a strong likelihood of being minors.

Rescuing victims of human sex trafficking is a priority for us. We have established strong cooperative relationships with nonprofit organizations and our State child protective services agency. The nonprofit organization End Slavery Tennessee is sometimes on site

during our operations. They offer services immediately on scene to women who come to the hotels answering Backpage ads.

We have conducted operations and investigations involving numerous perpetrators and victims. The one constant we encounter in our investigations is the use of online platforms like Backpage.com by buyers and sellers of underage sex.

Before I close, I want to point out that human sex trafficking cases offer another example of a crime that is enabled through emerging communications technologies. Victims are marketed on sites like Backpage.com, and traffickers and johns often use anonymous smartphone applications to facilitate and hide their negotiations over these children. This creates unique law enforcement challenges, which are sometimes referred to as “going dark” challenges.

So, while we need tools to discourage online platforms from facilitating commerce in children, it is clear that we also need a legal framework that ensures law enforcement can get the additional evidence we need to investigate these horrible crimes.

I appreciate the invitation to testify today and look forward to your questions.

[The prepared statement of Mr. Winkler follows:]



Written Statement by

Russ Winkler  
Special Agent in Charge  
Tennessee Bureau of Investigation

Before the United States House of Representatives Committee on Energy and Commerce  
Subcommittee on Communications and Technology

Hearing on  
**“Latest Developments in Combating Online Sex Trafficking”**

November 30, 2017

Chairman Blackburn, Ranking Member Doyle, and Members of the subcommittee, thank you for the opportunity to speak to you today. I am a Special Agent in Charge with the Tennessee Bureau of Investigation. One of my responsibilities is to oversee human sex trafficking investigations. I also serve as Co-Director of the Tennessee Fusion Center. The TBI's human trafficking section is a sub-unit of the Criminal Intelligence Unit, which is based in the Tennessee Fusion Center. For more than 25 years, I have been involved in conducting and supervising criminal investigations, and in training other law enforcement officers in how to conduct criminal investigations.

In 2010, the Tennessee General Assembly directed that a study be done on the impact of human sex trafficking in Tennessee. The TBI conducted the study in partnership with Vanderbilt University and published a report in 2011 titled *Tennessee Human Sex Trafficking and Its Impact on Children and Youth*. The report brought awareness to a crime about which most people knew very little up to that point. TBI Director Mark Gwyn described the results of the study as “shocking” because the study revealed that human sex trafficking in Tennessee

was more prevalent than first thought. Director Gwyn said that to effectively combat human sex trafficking in Tennessee, laws with more serious consequences were needed. By 2015, the TBI dedicated several agents to solely conduct criminal investigations into human sex trafficking and developed a training program to train all law enforcement officers in Tennessee on human sex trafficking. Since 2011, the Tennessee Governor has signed over fifty pieces of legislation passed by the General Assembly to combat human sex trafficking in our state. Because of the General Assembly's and Governor's leadership in making combatting human sex trafficking a top priority in Tennessee, we've been given the tools to combat this crime.

This year Tennessee ranked number one on Shared Hope International's State Report Card based on the Protected Innocence Challenge Legislative Framework, which is an analysis of state laws that sets a national standard of protection against minor sex trafficking. We are proud of that distinction. In particular, Tennessee received high marks for imposing substantial penalties for sex trafficking and for prohibiting the criminalization of minors engaged in prostitution.

My first real understanding of human sex trafficking came in 2012, when the TBI was asked to investigate what was reported to us as possible exploitation of a minor. A Tennessee man sold his 15 year old step-granddaughter for sex to numerous other men he connected with through the website AdultFriendFinder.com. Although there is not always a familial connection between a trafficker and a trafficking victim, stories of adult men selling underage girls for sex are all too common, and are frequently facilitated through the use of social media and other online platforms.

In Tennessee, we open human sex trafficking investigations based on information we receive from various sources, including the Tennessee Human Trafficking Hotline, other law enforcement agencies, our state child protective services agency, and through our partnerships with non-profit organizations.

Today as I sit here talking with you, the TBI has 66 active investigations into human sex trafficking where the victim is under 18. Circumstances vary, but there is a lot of commonality among these cases. An identified juvenile sex trafficking victim(s) has either run away from home and/or met someone online and there is a sex trafficking perpetrator(s) who takes the child and forces, threatens, or coerces her (the victim is nearly always female) to engage in sex acts for money. In most cases, the medium of choice for posting ads for underage sex is Backpage.com.

A recent investigation came to us by a local law enforcement agency as a runaway/missing 15 year old girl who may have become the victim of human sex trafficking. Our investigation revealed that a 15 year old girl left home after meeting an adult male on Facebook. The man came to her small town and picked her up. Within a day the man set the girl up in a motel room in Nashville and she began advertising on Backpage. After a brief covert operation, we found the girl in the motel room, along with another 17 year old girl who had also been reported as missing. The man and another adult female were arrested for trafficking the girls for commercial sex. Unfortunately, these circumstances are all too common in the human sex trafficking investigations we conduct.

We also are currently working 16 active investigations into human sex trafficking where the victim is an adult. The circumstances of these cases are quite similar to the juvenile cases we investigate in that Backpage.com is very often used as a means of facilitating the encounters.

The TBI takes a proactive approach to combating human sex trafficking by conducting covert operations that are focused on the demand side of human sex trafficking. We use a three pronged approach in our demand side covert operations.

First, we focus on people seeking to engage in commercial sex acts with females who are younger than 18, which in Tennessee is a Class A felony if the minor is under 15 and a Class B felony if the minor is between 15 and 17. We accomplish this through the use of undercover law enforcement officers posing as females who are providing commercial sex acts as advertised on Backpage.com. Fusion Center Intelligence Analysts post, pay for, and monitor our ads on Backpage. As the female undercover agents start engaging in phone and text conversations with potential customers they establish through these conversations that they are juveniles. Up to this point the customers have always been male. The undercover agents typically tell the men they are communicating with that they are younger than 18. Some men are deterred by this and end the conversations. However, many are not deterred and continue to engage our undercover agents in conversation. Several men eventually show up at hotels where we set up encounters with undercover agents. The undercover agents meet with the men in a hotel room, and again engage in conversation that clearly establishes that they are juveniles so that it is further documented that the men are fully aware that they are about to

engage in commercial sex acts with a minor. Money is given to the undercover agents, and the men are promptly approached by uniformed law enforcement officers who are waiting in the next room. Members of this subcommittee have probably seen this scenario on TV a few times. For us, it is now a routine operation. The demand is staggering and we know we are not unique among the states.

TBI's most recent covert human sex trafficking operation was conducted in Brentwood, a suburb of Nashville. This operation was conducted in cooperation with the Brentwood Police Department and Homeland Security Investigations (HSI) under U.S. Immigration and Customs Enforcement (ICE). We posted ads on Backpage.com advertising our undercover agents. Over three days we received calls and text messages from 1,128 different phone numbers. There were a total of 7,879 calls and text messages exchanged between men and the undercover agents. Twenty one men were apprehended when they came to the hotel room and paid to engage in commercial sex acts with the undercover female agents, who they believed were juveniles.

In the second prong of our demand side covert operations we focus on people who traffic others for commercial sex acts. We accomplish this through the use of male undercover TBI agents posing as "Johns" seeking to purchase adult and minor females to engage in commercial sex acts. The undercover "Johns" respond to advertisements that the Fusion Center Intelligence Analysts find on Backpage.com. Fusion Center Intelligence Analysts use advanced software called "Spotlight" to help identify ads that have a strong likelihood of being "immature", under the control of another person, or posted by minors.

In our recent covert operation in Brentwood we apprehended a man who brought an adult female to the hotel to engage in commercial sex acts with the undercover John. The man was in possession of \$5,000 in cash, and had also recently been arrested in a nearby town for promoting prostitution.

In the third prong of our demand side covert operations we focus on the rescue of human sex trafficking victims. This is accomplished through cooperation with non-profit organizations and our state child protective services agency.

In our recent covert operation in Brentwood, the non-profit organization known as End Slavery Tennessee was on-site during this portion of the operation and was able to offer services to two women who came to the hotel answering ads we responded to that we found on Backpage.com.

Since the inception of the TBI's human sex trafficking section, we've conducted 11 covert human sex trafficking operations across Tennessee involving hundreds of perpetrators and victims. We've conducted operations in major cities, and in smaller towns. We are continually refining our operations to ensure safety of the agents and to ensure the legality of the cases made as a result of the operations. But the one constant we encounter in our investigations is the use of Backpage.com by buyers and sellers of underage sex.

Before I close, I would like to take a moment to point out that human sex trafficking cases offer yet another example of a crime that is enabled through emerging communications technologies. Victims are marketed on sites like Backpage.com, and pimps and johns use smartphone applications to facilitate and hide their negotiations over these children. As in

other areas, more and more, evidence critical to securing justice for victims in the most serious crimes exists in the digital world. Online platforms and applications offer unprecedented power and convenience, but they create unique law enforcement challenges as well. We urge Congress to consider this as yet another example of the need for legal structure that ensures that law enforcement can access the digital evidence we need to keep the public safe.

I appreciate the invitation to testify today. We are pleased to serve as a resource for this subcommittee as you consider policy improvements that can help us reduce the likelihood that children will be victimized and traumatized through the commission of these horrible crimes.

Mrs. BLACKBURN. Thank you.  
 The gentleman yields back.  
 Mr. Goldman, you are recognized for 5 minutes.

#### STATEMENT OF ERIC GOLDMAN

Mr. GOLDMAN. Thank you.

Chairman Blackburn, Ranking Member Doyle, and members of the subcommittee, I applaud the efforts of Congress and this subcommittee to combat the horrible crime of sex trafficking. These efforts include the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, called FOSTA.

I defer to experts in the sex trafficking victim advocacy community about whether FOSTA would help victims. Based on my expertise in internet law, I will discuss FOSTA's implications for 47 U.S.C. 230, the law that Congress enacted in 1996 that says websites aren't liable for third-party content.

Section 230 ranks as one of Congress' most important policy achievements in the last quarter-century. Section 230 touches deeply each of our lives by enabling the internet services we rely upon every waking hour. It also advances free speech by helping ordinary people communicate with a global audience for the first time in history. Furthermore, Section 230 improves marketplace efficiency across our entire economy and reduces entry barriers so that new and innovative online services can keep emerging.

Section 230 is a globally unique policy. No other country provides such strong protections for online publishers of third-party content. This differentiation gives the United States a global competitive advantage for such services, which has helped create enormous social value here in the United States.

Congress enacted section 230 in response to a 1995 ruling that an online service could be liable for user content because it had removed other objectionable content. The ruling created a dilemma for all online services that moderate user content. Online services had to choose between two strategies: one, exercise full editorial control over user content and accept liability for whatever legally problematic content they miss; or, two, minimize potential liability by exercising no editorial control over user content.

Some services can't afford to exercise full editorial control. Other services, such as tools for real-time communications, can't function with full editorial control. Thus, if failing to moderate content perfectly leads to liability, some online services will abandon efforts to moderate user content or even shut down.

Section 230 eliminated this moderator's dilemma. Section 230 applies regardless of what online services do to moderate content or even what they know about user content. This means online services can deploy and experiment with a wide range of content moderation techniques without fearing liability for what they miss. This helps online services, but it also helps people access publication tools that let them reach new audiences.

FOSTA would reinstate the moderator's dilemma. For the first time in over 2 decades, it would cause online services to question whether they should moderate content. Some services will conclude that it is too risky to do so. If online services reduce or eliminate their moderation efforts, FOSTA may counterproductively cause a



net increase in sex trafficking promotion and all other types of antisocial content.

Section 230 does not give a free pass to online services facilitating sex trafficking. Section 230 does not limit Federal criminal prosecutions, and the Department of Justice has prosecuted online services for publishing third-party ads, including at least two prosecutions against services, MyRedBook and Rentboy, that facilitated online prostitution. Furthermore, in the 2015 SAVE Act, Congress criminalized online advertising of sex trafficking, and a Phoenix grand jury has been investigating backpage.

Congress can balance additional anti-sex-trafficking initiatives with section 230's benefits by: one, ensuring that online services face only a single Federal standard of liability rather than State-by-State variations that will make it difficult or impossible for online services to determine what law applies to them; two, encouraging online services to continue performing socially valuable content moderation efforts by basing liability on an online service's intent to facilitate illegal activities, not on what it knows, and expressly saying that online services shall not be legally penalized for their moderation efforts. I oppose FOSTA because it does not conform to either principle.

Thank you for the opportunity to address the subcommittee on this very important matter.

[The prepared statement of Mr. Goldman follows:]



**U.S. House of Representatives Committee on Energy and Commerce**  
**Subcommittee on Communications and Technology**

Hearing on "Latest Developments in Combating Online Sex Trafficking"

November 30, 2017

Written Remarks of Professor Eric Goldman

Santa Clara University School of Law<sup>\*</sup>

Summary of Major Points:

- \* Section 230 ranks as one of Congress' most important policy achievements in the past quarter-century.
- \* Section 230 means that online services can deploy, and experiment with, a wide range of content moderation techniques without fearing liability for whatever they miss.
- \* Congress can balance anti-sex trafficking initiatives with Section 230's benefits by (1) exposing online services only a single federal standard of liability rather than state-by-state variations; and (2) encouraging online services to keep performing socially valuable content moderation efforts.

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<sup>\*</sup> Professor of Law, Co-Director of the High Tech Law Institute, and Co-Supervisor of the Privacy Law Certificate, Santa Clara University School of Law. I'm testifying on own behalf, not on behalf of my employer or anyone else. I started practicing Internet Law in 1994, and I started teaching Internet Law in January 1996—in both cases, before Section 230 was enacted. Email: [egoldman@gmail.com](mailto:egoldman@gmail.com). Website: <http://www.ericgoldman.org>.

Chairman Blackburn, Ranking Member Doyle, and Members of the Subcommittee:

I applaud the efforts of Congress and this subcommittee to combat the horrible crime of sex trafficking. These efforts include the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (sometimes called “FOSTA”).<sup>1</sup> I defer to experts in the sex trafficking victim advocacy community about whether FOSTA would help victims.<sup>2</sup> Based on my expertise in Internet law, I’ll discuss FOSTA’s implications for 47 U.S.C. §230 (Section 230), the law Congress enacted in 1996 that says websites aren’t liable for third party content.

#### *Section 230 Is One of Congress’ Greatest Policy Achievements*

Section 230 ranks as one of Congress’ most important policy achievements in the past quarter-century.<sup>3</sup> Section 230 deeply touches each of our lives by enabling the Internet services we rely upon every waking hour.<sup>4</sup> It also advances free speech by helping ordinary people communicate with a global audience—for the first time in history. Furthermore, Section 230 improves marketplace efficiency across our entire economy<sup>5</sup> and reduces entry barriers so that new and innovative online services keep emerging.

<sup>1</sup> Appendix 1 compares FOSTA with the most recent version of SESTA.

<sup>2</sup> The expert community is not unanimous that FOSTA would help victims. *See, e.g.,* Alex F. Levy, *How Section 230 Helps Sex Trafficking Victims (and SESTA Would Hurt Them)*, Tech. & Mktg. L. Blog, Aug. 15, 2017, <http://blog.ericgoldman.org/archives/2017/08/how-section-230-helps-sex-trafficking-victims-and-sesta-would-hurt-them-guest-blog-post.htm>; Nyssa P. Chopra, *Another Human Trafficking Expert Raises Concerns About SESTA*, Tech. & Mktg. L. Blog, Nov. 2, 2017, <http://blog.ericgoldman.org/archives/2017/11/another-human-trafficking-expert-raises-concerns-about-sesta-guest-blog-post.htm>; *Freedom Network Urges Caution in Reforming the CDA*, <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf>; Letter from Kristen DiAngelo, Executive Director, Sacramento Sex Workers Outreach Project, to Sens. John Thune & Bill Nelson, <https://www.eff.org/files/2017/09/18/sestahearing-sac-swop.pdf>; *SWOP-USA Stands In Opposition of Disguised Internet Censorship Bill SESTA*, S. 1963, Aug. 11, 2017, <http://www.new.swopusa.org/2017/08/11/call-to-actionpress-release-swop-usa-stands-in-direct-opposition-of-disguised-internet-censorship-bill-sesta-s-1963-call-your-state-representatives-and-tell-them-to-fight/>.

<sup>3</sup> Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TULANE J. TECH. & I.P. \_\_ (2017), <https://ssrn.com/abstract=3025943>.

<sup>4</sup> The 10 most-trafficked U.S. websites (as ranked by Alexa in October 2017) all rely heavily on Section 230. The sites are Google, YouTube, Facebook, Reddit, Amazon, Yahoo, Wikipedia, Twitter, eBay and LinkedIn.

<sup>5</sup> I explain how Section 230 improves marketplace efficiency in Appendix 2.

Section 230 is a globally unique policy.<sup>6</sup> No other country provides such strong protections for online publishers of third party content. This differentiation gives United States a global competitive advantage for such services, which has helped create enormous social value in the U.S.<sup>7</sup>

#### *Section 230 Avoids the Moderator's Dilemma*

Congress enacted Section 230 in response to a 1995 ruling that an online service could be liable for user content because it had removed other objectionable content.<sup>8</sup>

The ruling created a dilemma for all online services that moderate user content. Online services had to choose between two strategies: (1) exercise full editorial control over user content and accept liability for whatever legally problematic content they miss, or (2) minimize potential liability by exercising no editorial control over user content.

Some services can't afford to exercise full editorial control, and other services (such as tools for real-time communication) can't function with full editorial control. Thus, if failing to moderate content perfectly leads to liability, some online services will abandon their efforts to moderate user content or even shut down.

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<sup>6</sup> ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 330 (July 14, 2017 ed.).

<sup>7</sup> Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Consulting, June 5, 2017, <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>; David Post, *A Bit of Internet History: or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, Volokh Conspiracy, Aug. 27, 2015, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/?utm\\_term=.87428a710ed7](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/?utm_term=.87428a710ed7).

<sup>8</sup> *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995) (“PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards [and] implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce”).

Section 230 eliminated this “moderator’s dilemma.” Section 230 applies regardless of what online services do to moderate content or even what they “know” about user content. This means that online services can deploy, and experiment with, a wide range of content moderation techniques without fearing liability for whatever they miss. This helps online services, but it also helps people access publication tools that let them reach new audiences.

FOSTA would reinstate the moderator’s dilemma. For the first time in over two decades, it would cause online services to question whether they should moderate content. Some services will conclude that it’s too risky to do so. If online services reduce or eliminate their moderation efforts, FOSTA may counterproductively cause a net increase in sex trafficking promotions (and all other types of anti-social content).

#### *Combating Sex Trafficking While Preserving Section 230*

Section 230 does not give a “free pass” to online services facilitating sex trafficking. Section 230 does not limit federal criminal prosecutions,<sup>9</sup> and the Department of Justice has prosecuted online services for publishing third party ads, including at least two prosecutions against services (MyRedbook and Rentboy) that facilitated online prostitution.<sup>10</sup> Furthermore, in the 2015 SAVE Act, Congress criminalized online advertising of sex trafficking, and a Phoenix grand jury has been investigating Backpage.com.

Congress can balance additional anti-sex trafficking initiatives with Section 230’s benefits by:

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<sup>9</sup> 47 U.S.C. § 230(e)(1).

<sup>10</sup> Cary Glynn, *The DOJ’s Busts of MyRedbook & Rentboy Show How Backpage Might Be Prosecuted*, Tech & Mktg. L. Blog, Sept. 28, 2017, <http://blog.ericgoldman.org/archives/2017/09/the-dois-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm>.

1) Ensuring that online services face only a single federal standard of liability, rather than state-by-state variations that will make it difficult or impossible for online services to determine what law applies to them.

2) Encouraging online services to continue performing socially valuable content moderation efforts by: (A) basing liability on an online service's intent to facilitate illegal activities, not what it "knows," and (B) expressly saying that online services shall not be legally penalized for their moderation efforts.<sup>11</sup>

I oppose FOSTA because it does not conform to either principle. Thank you for the opportunity to address the subcommittee on this important topic.

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<sup>11</sup> I proposed this addition to SESTA: "The fact that a provider or user of an interactive computer service has undertaken any efforts (including monitoring and filtering) to identify, restrict access to, or remove, material it considers objectionable shall not be considered in determining its liability for any material that it has not removed or restricted access to." See Eric Goldman, *Answers to Questions for the Record Regarding S. 1693, the Stop Enabling Sex Traffickers Act of 2017*, Nov. 6, 2017, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2593&context=historical>.

### Appendix 1: Comparison of FOSTA and SESTA

This chart compares the major differences between the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), as introduced in the House of Representatives on April 3, 2017, and the Stop Enabling Sex Traffickers Act of 2017 (SESTA), as passed by the Senate Committee on Commerce, Science, and Transportation on November 8, 2017.

	FOSTA	SESTA
State crime enforcement	Section 230 excludes “section 1591 of such title (relating to sex trafficking);” “any State criminal statute that prohibits—(i) sexual exploitation of children; (ii) sex trafficking of children; or (iii) sex trafficking by force, threats of force, fraud, or coercion”; and victim restitution.	Section 230 excludes “any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of section 1591 of title 18, United States Code.”
Civil enforcement	Section 230 excludes “section 1595 of title 18, United States Code” and “any other Federal or State law that provides causes of action, restitution, or other civil remedies to victims of (i) sexual exploitation of children; (ii) sex trafficking of children; or (iii) sex trafficking by force, threats of force, fraud, or coercion.”	Section 230 excludes “any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title.”  Also: “In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.”
What constitutes “participation in a [sex trafficking] venture”	“knowing or reckless conduct by any person or entity and by any means that furthers or in anyway aids or abets the violation of [18 U.S.C. §1591](a)(1).”	“knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”
New crime	“Whoever, being a provider of an interactive computer service, publishes information provided by an information content provider, with reckless disregard that the information provided by the information content provider is in furtherance of an offense under subsection (a) or an attempt to commit such an offense, shall be fined in accordance with this title or imprisoned not more than 20 years, or both.”	N/A

Other provisions, such as legislative findings, statements about Section 230's policy, and retroactivity, are substantively identical in both bills. However, SESTA contains a more detailed savings clause to supplement the retroactivity provision.



### **Appendix 2: How Section 230 Facilitates Marketplace Efficiency<sup>\*</sup>**

Congress enacted 47 U.S.C. § 230 in 1996, at the height of “Internet exceptionalism”—the belief that the Internet was a unique medium compared to other media. Thus, the law represents an unusual example of legislative restraint. Fearing that Congress, state legislatures or the courts would develop rules that prevent the Internet from reaching its full potential, Congress immunized online intermediaries from liability for publishing third party content—even in situations where offline intermediaries would face liability for publishing the exact same content.

Treating the Internet as a unique medium has led to the advent of consumer reviews, a whole new class of content we never saw in the offline world. Consumer opinions about goods and services in the marketplace have been shared for millennia, principally as oral “word of mouth.” However, prior to the Internet, consumers could not easily share their opinions with larger audiences. In contrast, the Internet allows consumers to share their opinions with a mass audience at virtually no cost. Humankind has never seen a phenomenon like this before.

While consumers value other consumers’ reviews generally, they especially value comprehensive and curated databases of other consumers’ reviews. However, if websites faced liability for gathering and curating consumer reviews, they would be reluctant to undertake those efforts. 47 U.S.C. § 230 provides them a legal immunity for these generation, curation and publication efforts. The result has been a proliferation of consumer review websites.

Thus, 47 U.S.C. § 230 helps create an unprecedented class of published content—consumer reviews—by providing legal immunity to consumer review websites for generating, curating and publishing those reviews.

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<sup>\*</sup> Adapted from Eric Goldman, *Expert Report on the Value of Consumer Review Websites and 47 USC 230*, Tech. & Mktg. L. Blog, Nov. 12, 2012, [http://blog.ericgoldman.org/archives/2012/11/expert\\_report\\_o.htm](http://blog.ericgoldman.org/archives/2012/11/expert_report_o.htm).

The marketplace's "invisible hand"—the mechanism that rewards good producers and punishes bad producers—depends on well-informed consumers. Consumer reviews educate other consumers about which producers deserve their dollars. Plus, vendors become more responsive to consumers' demands, knowing they will be publicly accountable for how well they meet consumers' needs. Consumer reviews thus improve our marketplace's operation.

By strengthening America's marketplace, 47 U.S.C. § 230 improves our country's competitive position compared to other countries. No other country provides as generous a legal immunity for consumer review websites as 47 U.S.C. § 230. Instead, in other countries, businesses typically can "veto" consumer reviews they don't like; and naturally, they will only veto critical reviews. Compared to their foreign counterparts, American consumers have more access to consumer reviews—especially negative consumer reviews—to guide their marketplace choices. Over time, as consumer reviews improve the "invisible hand" of American consumers, the American marketplace will become more efficient than foreign marketplaces. Ultimately, 47 U.S.C. § 230 will help make the American economy stronger than foreign economies.

Mrs. BLACKBURN. Thank you, Mr. Goldman.

The gentleman yields back. That concludes our testimony.

At this time, I have several documents to enter for the record: Shared Hope International, Exodus Cry, the National Center on Sexual Exploitation, and the Coalition Against Trafficking in Women submit a statement. We have a letter from Shared Hope International; an article from The Register-Guard; a letter written April 3, 2012, that Ms. Maloney and I did to Google, Larry Page of Google, questioning Backpage, so we have been working on this for quite a while; and then a letter submitted and testimony from Mr. Chris Cox, partner from Morgan Lewis, and he is the outside counsel for NetChoice.

Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mrs. BLACKBURN. So let's begin our questions.

And, Mr. Winkler, I want to come to you to begin. You referenced the sting that you had conducted, and we all know that that made headlines, of course, in Tennessee but also around the country. And we have looked at how Tennessee is number one in Shared Hope International's study.

And what I would like to hear from you and I think everyone on this panel, Democrat and Republican, would like to hear from you, what do you think has made the difference in Tennessee? What do you use most within the law? What would you like to see changed?

The partnership—Ms. Smith, you may want to weigh in on this—but you are doing something different. You are getting results.

And I would like for you to begin, Mr. Winkler, and then, Ms. Smith, for you to add to his answer.

Mr. WINKLER. Yes, Chairman. I think that the continued commitment by the general assembly and the Governor and the TBI director to support human trafficking investigations and our partnerships across the State with the nonprofit organizations and our partnership with our State's child protective services agency, all those things combined have been a tremendous help in Tennessee.

A lot of emphasis has been placed on enhancements in the law to make it more punishable for both buyers and sellers of sex acts with juveniles. And I think that all those things combined is what has really helped us in Tennessee combat this problem.

Mrs. BLACKBURN. OK.

Ms. Smith?

Ms. SMITH. I agree. I think it takes all parts of the puzzle working together. So you have to have law enforcement, legislature, the courts, child protective services, and service providers all working together communicating and collaborating together. I think that is something we do very well.

Law enforcement does work we can't do—investigate, prosecute the perpetrators, rescue. We can bring a survivor and an advocate perspective so that they can work in a trauma-informed way. We can bring survivors on the scene at those stings to build trust and transfer that trust to law enforcement so they are a lot more likely to cooperate. And if you don't have services in place for the victims, they are not going to stick around to make a good case. So everything intersects together.

Mrs. BLACKBURN. Let me ask you this. How are you all working in educating healthcare professionals?

Ms. SMITH. We actually, right now, are working with one of the large hospital systems. They have been working with us for about a year to create training for all of their staff nationwide. We are doing a beta rollout now in our region to train everybody from ER staffs to the receptionists at clinics.

And we have a protocol in place so that they have a trauma-informed response. So they know to call the hotline number, they know the protocol for service provision, for mandatory reporting.

And then, in our case, we bring survivors on the scene from our staff to be there immediately to build their trust and to offer them services.

Mrs. BLACKBURN. OK.

I want to go to you, Ms. Souras and Ms. Smith. I did some reading in preparation for the hearing and looking at who is kind of the target victim for this, and many times it seems as if it is young girls who are in State or foster care custody, if you will.

And I would like for you—we will begin with you, Ms. Souras, and then to Ms. Smith—to just talk about how these perpetrators of the crime go about targeting these victims, and then add if there is anything you think we could do differently.

Ms. SOURAS. Absolutely. Thank you, Chairman Blackburn.

You are absolutely right that the location of the child often has great bearing on whether they were vulnerable to being exploited.

NCMEC really views child sex trafficking victims as a missing-child problem. In our experience, and as an example, just last year, in 2016, one of six runaways reported to us were likely sex trafficking victims, and, of those, 86 percent were running from State care. So definite correlations between children who were running away and also where they are running away from and, again, their ultimate vulnerabilities.

In our experience, the average victim is a girl, even though there are boys and LGBTQ youth, of course, who are trafficked as well. But, again, average victim is a girl about 15½ years old. Between 15 and 17 is the general age range we see.

And, typically, these are children who are really experiencing an array of vulnerabilities. They are looking for something. It might be a parental figure. It might be love or affection, someone to care about them. You know, we often talk about children who are seeking, really, human basic requirements—safety, security, shelter. These are children who, you know, are not receiving that in their current home or social services setting. So they are very susceptible to false promises, false promises of love, shelter, again, security—very basic needs. And that really is how they are lured.

These are children who are, you know, often seeking just the smallest remnant of kindness from someone, so the smallest extension of that from a trafficker. And traffickers know who to extend that to and what that child might be looking for. That is often enough, just, again, for them to feel like someone has done something kind for them or something to care about for them.

Mrs. BLACKBURN. Ms. Smith?

Ms. SMITH. I ditto that 100 percent.

And I will say that foster care and the State custody system is a perfect pool for exploitation, because you have those children who are vulnerable. And we know lots of girls who were actually recruited within the system, out of group homes. There would be somebody who was recruiting on behalf of a trafficker.

It is a system that sets things up for exploitation because these girls learn, "Oh, I have a family who gets paid to take care of me." That kind of mentality can transfer to a trafficker. "Well, he is going to take care of me, and it is reasonable that he is getting money to do so."

And I think I would add, though, that there is such a thing as familial trafficking. There are family members who traffic their children for money for drugs, usually, or for alcohol. And so, in that State system, when we are dealing with child services, there needs to be a track that is identifying those children and that is giving them the kind of specialized care that they need. They can't just be lumped in with the truants and the runaways and the unruly children. There needs to be a track that quickly gets them into the services they need.

Mrs. BLACKBURN. Thank you.

My time has expired, and at this time I yield to Mr. Doyle, 5 minutes.

Mr. DOYLE. Thank you, Madam Chair.

Mr. Goldman, in your testimony, you mention two ways you believe that Congress can achieve a balanced solution: first, by avoiding a patchwork of State laws, which websites would have to comply; and then, secondly, by targeting a website's intent to facilitate illegal activities.

I wonder, have you seen Mr. Goodlatte's proposed amendment to Mrs. Wagner's legislation that involves targeting the facilitation of prostitution with a specific intent standard and carving out State criminal laws that would do the same thing? Would such a proposal serve that purpose of balance?

Mr. GOLDMAN. I have seen the proposed legislation, and I do think that the effort to focus on the specific intent to facilitate prostitution is a productive way of approaching the issue. And I consider it to be superior than the alternatives that I have seen.

Mr. DOYLE. You know, I want to again applaud the good work of the Senate Permanent Subcommittee on Investigations because they bringing the details of this issue in focus. And after reading their staff report, it is clear that Backpage.com not only profited from online sex trafficking but that Backpage.com also helped to develop content for online sex traffickers.

Now, Professor Goldman, it is my understanding that section 230 does not protect the website when it develops content in this way. So could you explain for us where the courts have drawn the line between developing content which is not protected and allowing third-party posts, which is?

Mr. GOLDMAN. The statute excludes anyone—it is protection for anyone who creates or develops content in whole or in part. So someone who develops content in part is not covered by the statute per its terms.

In my opinion, the courts have interpreted that to really say that the party doesn't qualify for the section 230 immunity if they de-

velop what is illegal about the content. And so there is a nexus between developing the content and developing what made it illegal. And I think that that is a helpful guidance for us to think about.

Mr. DOYLE. So if the facts that were laid out in the Senate report are true, do you think Backpage.com can continue to use section 230 as a shield?

Mr. GOLDMAN. I must say that the facts have raised a lot of questions about exactly how we interpret the statutory language, and I am eager to see what the courts end up doing with the facts that they have.

Certainly, in Backpage's case, we have a lot of suspicion about the legitimacy of their motives. But some of what they were doing are common tactics on the internet, and we need to make sure that whatever happens to Backpage doesn't also create problems for the other sites that might be doing similar things but with a much less pernicious objective.

Mr. DOYLE. Mrs. Wagner's SAVE Act was recently passed into law. And can you tell us what tools this legislation gives law enforcement in pursuing sites like Backpage and how prosecutors and their investigators are starting to utilize it in their investigation?

And maybe you and Mr. Winkler could respond to that.

Mr. GOLDMAN. So the SAVE Act criminalized knowingly advertising sex trafficking. And that is a new crime that did not exist. So it did cover some new area that had not been covered by any other crime.

That law was just passed in 2015. I don't know what the typical turnaround times are for new crimes being enacted and the actual usage of them. So it is fairly early in the development of that particular law to gauge whether or not it has been effective.

We do know that there is a grand jury investigation that has been investigating Backpage in Phoenix. We don't know what is going on in the grand jury investigation because that is a black box to us; it takes place under the cloak of secrecy. But it would be logical to me that the SAVE Act would be one of the grounds on which the DOJ has asked the grand jury to investigate Backpage.

Mr. DOYLE. Mr. Winkler, have you been able to utilize that act in any of your investigations or prosecutions?

Mr. WINKLER. No, sir. I am not familiar with the details of that. But did you have a question, too, about Spotlight, or did I misunderstand?

Mr. DOYLE. No, I didn't.

Mr. WINKLER. OK. Well, I am not familiar with that act, sir.

Mr. DOYLE. OK. Thank you.

Madam Chair, I will yield back.

Mrs. BLACKBURN. The gentleman yields back.

Mr. Guthrie, 5 minutes.

Mr. GUTHRIE. Thank you, Madam Chairman.

So I was sitting here just listening, and Ms. Smith described how quickly girls or ladies were transferred from Atlanta to Nashville and set up—I think you said as easy as ordering a slice of pizza. And Mr. Winkler commented specifically on the online platforms and the difficulty it has had in trying to deal with this.

And I know section 230 was passed in 1996 through a Republican Congress, through this committee. But when you hear the sto-

ries of what is coming out of this, it has to be addressed—absolutely has to be addressed.

And, Mr. Goldman, when Mr. Doyle asked you about the Goodlatte amendment, I noticed you said it is superior to the current bill, but do you think it is acceptable and something you would like to see passed into law?

Mr. GOLDMAN. Personally, I would favor waiting to see how the developments play out in the courts. There are a number of developments taking place right now that are very germane to what we are discussing.

For example, just on Tuesday, a Backpage challenge against the Missouri attorney general investigation was dismissed, in part with the court noting that section 230 may not protect Backpage and that would not be the grounds to hold back the Missouri AG investigation.

So we know right now things are taking place, and my preference would be to see how that plays out.

Mr. GUTHRIE. So there is no amendment acceptable? You would rather this legislation sit until some court makes a decision?

Mr. GOLDMAN. I think that—

Mr. GUTHRIE. Or do you have something that would be acceptable now?

Because the issue is, we hear that a lot in Congress. The legislative branch, we do things, and we will let the court clarify, we will let them move forward, you know. In my personal opinion, it is our job to do that. If we know there is a problem that needs to be out there, we don't need to wait, "Well, let's see what a court decision is going to do," if we can clarify that ourselves. I think that is what the American people expect.

And so is there not anything we could do now that you would find acceptable that might address the problem, or do you think we should just wait on a court?

Mr. GOLDMAN. Yes—no, I respect that, that the whole reason why we are here is because you are in the position to take advantage of the tools that you have to solve the problems that you see.

I think that the best call is to let the existing law that Congress enacted in 2015 and all the other laws that Congress passed play out. If we are going to pursue legislation—like you said, that is what Congress does—I do think that the two principles I mentioned would be the guiding principles for how I would consider legislation to be acceptable.

Mr. GUTHRIE. Thanks.

On another topic, Ms. Souras, the Missouri attorney general, in your testimony, you specifically said that one of the issues is the patchwork attorney generals are having to move forward. What is the issue with going State by State versus us addressing this? Why does it need to be addressed here instead of waiting for a State-by-State attorney generals process?

Ms. SOURAS. Thank you, Representative Guthrie.

What we really have seen over the past few years is more or less a complete foreclosure on the State attorneys general in their ability to protect children from trafficking in their own States.

And I will point to the California attorney general's investigation and subsequent attempts to prosecute Backpage not once but twice

on pimping charges over the past, I believe, 2 years. After a very long investigation into Backpage, pimping and, you know, other related charges were filed against Backpage in the Sacramento Superior Court by the State attorney general's office. The court dismissed all of the pimping charges based on the broad interpretation of the CDA.

Just before Attorney General Kamala Harris moved to the Senate at the end of 2016, she had her office refile those pimping charges with some additional facts developed to try to answer to the court's last order. And the judge, the new judge, in the second case, again dismissed the pimping charges, again based on the Communications Decency Act.

So what we have at this point and what we have heard from the courts, including the courts in California, is really that Congress needs to clarify that State attorneys general can join this battle, that they can join Federal prosecutors. I know you didn't ask about civil remedies and civil attorneys, but it is the same in that realm as well. Currently, State attorneys general simply do not have the ability to get around the CDA.

Mr. GUTHRIE. Thank you.

And I have been to NCMEC, and I actually have a bill that has passed the House and hopefully reauthorizing NCMEC as we go forward. And I was going to ask you a question about that, but I will save that. I am running out of time.

Just to say, what your people in that building go through every day, we are blessed as Americans to have people willing to do that kind of work. It is disturbing to see, but we have people there doing it. And I am sure, Ms. Smith, you are seeing the same; Mr. Winkler, the same thing. And it is really good that we have people on the front lines trying to combat this. And we need to give them the tools. We need to be judicious, but we also need to give them the tools available to do it.

And thank you for being here.

I yield back.

Mrs. BLACKBURN. The gentleman yields back.

Mr. McNerney, you are recognized for 5 minutes.

Mr. MCNERNEY. Well, I thank the chairwoman, and I thank the witnesses today. This is a difficult subject and something that needs to be done. It is urgent.

Ms. Souras, in 2015, Congress passed the Stop Advertising Victims of Exploitation, or the SAVE Act. Do you think the SAVE Act has been effective in giving prosecutors the tools to bring down sites like Backpage.com?

Ms. SOURAS. Thank you for the opportunity to address that. And I will, you know, piggyback a little bit on what Mr. Goldman said. He did explain that the SAVE Act was enacted at the end of 2015. It basically added advertising as one of the new predicate acts that one could commit under the Federal trafficking statute.

One thing that is very important, though, to take into account is that the statute was enacted at the end of 2015. Backpage immediately filed court papers in the Federal court here in the District of Columbia to basically enjoin that statute, saying that it was unconstitutional. They filed suit against the Department of Justice. That case was not resolved until October of 2016.



So, even though it may feel as though the law has been around for a couple of years and no one has used it, I would, you know, provide a bit of a counter view on that and say the law has really only been available to prosecutors out from under the specter of what that court's decision might have been for just about a year, which simply is not a long time when you think of a Federal investigation to be teed up and pursued.

Mr. MCNERNEY. And I was going to ask you, first of all, are we clear of courts possibly overturning the SAVE Act at this point? Is the SAVE Act safe, you know, in legislative/judicial terms?

Ms. SOURAS. Well, it was a curious decision that the DC District Court issued. They did not actually address the substance of the constitutionality issue. They actually found that Backpage did not have appropriate standing, and they ruled on ancillary issues. So one could view that act as still being susceptible, if it were used in a prosecution, to constitutionality arguments.

Mr. MCNERNEY. Well, do you think that the Congress needs to examine whether Federal prosecutors and investigators have sufficient resources to combat online sex trafficking?

Ms. SOURAS. So I think that is always a valid measure. You know, certainly at NCMEC we have such close partnerships with Federal and State law enforcement, and we, you know, always are encouraged by discussions around offering them more resources. But what I would—what I would suggest is that what Federal prosecutors need is not necessarily more resources or new laws; they need more players on their team. And by that I mean State attorneys general and civil attorneys as well.

Mr. MCNERNEY. That was my next question. Does the Goodlatte amendment allow State prosecutors to go ahead and prosecute cases as long as they comply with Federal requirements?

Ms. SOURAS. So the language that I have seen, which I understand is very much in flux and has shifted again, I believe, since I saw a draft of it, permits that in extremely limited ways, and I would argue much more limited than the current FOSTA bill or the Senate bill, SESTA.

Mr. MCNERNEY. Thank you.

Professor Goldman, thanks for coming out here from the bay area. I want to make sure I understand a few things about section 230. Does section 230 prohibit Federal law enforcement from going after websites that host advertisements for sex trafficking?

Mr. GOLDMAN. No.

Mr. MCNERNEY. Does section 230 protect individuals that actively engage in sex trafficking?

Mr. GOLDMAN. No.

Mr. MCNERNEY. In your written testimony, you state that section 230 ranks as one of Congress' most important policy achievements in the past 25 years, a quarter century. What makes that section so important? What gives it the teeth that it has?

Mr. GOLDMAN. It becomes the infrastructure for the entire internet ecosystem, which itself is infrastructure for our entire society. So the one little thing it does, saying publishers aren't liable for third-party content, creates this vast array of activity that wouldn't exist for any other reason except for the internet and its enablement through section 230.

Mr. MCNERNEY. What would the world—or the internet world—what would the internet look like without 230?

Mr. GOLDMAN. Well, we have some examples about that because we see what it looks like in other countries. And they don't have the same kind of robust user to user interactivity that we have here in the United States. If they have it, it is because it is provided by companies based here in the U.S.

Mr. MCNERNEY. So basically 230 is doing what it is supposed to do, and we may not need to amend it until we find out if it is effective as we hope it is?

Mr. GOLDMAN. Section 230 is a very powerful statute, and so amendments to it have potential for very dramatic effects.

Mr. MCNERNEY. Thank you. I yield back.

Mrs. BLACKBURN. The gentleman yields back.

Mr. Olson, 5 minutes.

Mr. OLSON. I thank my friend from Tennessee from the bottom of my heart for having this important hearing. Modern-day slavery happens all over America, as Mrs. Wagner said in the first panel. It happens in my hometown of Sugar Land, Texas. Slavery for sex and labor. It is ugly, offensive, but it is real.

It is so offensive and so ugly that some law enforcement people back home say it doesn't exist. But it does. In April 2016, back home, a high school senior, very attractive, disappeared at night working at a local gym 500 yards from my official office in the heart of Sugar Land. She had just turned 18, so she was a legal adult. Her father knew that, unless he found her in 30 days, she would likely be gone forever.

Luckily, he had resources to hire former Special Forces, SEALs, Green Berets, reinforced recon, and put a full-on onslaught on social media. He got her back. That situation had been planned for 2 years. She befriended the so-called groomer when she was 16. He used Snapchat to communicate with her to give her drugs, get her hooked, and keep that from her parents. That family was lucky; they got their daughter back. And so was my family.

Last June, my daughter went to South Africa on an overseas study program with her college. She went to Durban, South Africa. No one told us that was a hot bed for human trafficking. The students had to walk about half a mile from the dormitory to the classroom. In the middle of a bright sunny day, 2 p.m., four-lane road, center divider, a car pulled up in front of my daughter and her new friend. Three large men jumped out. One had a pistol in his left hand. My daughter saw the pistol. That man grabbed her shoulder, tried to take her in that car. Luckily, she had her backpack hanging with one strap on her right shoulder, the one he grabbed. The backpack came off. That gave her new friend the time to grab her right arm and pull her away.

They ran as fast as they ever could. My daughter said: I was waiting to hear gunshots and being shot and dying in South Africa.

Luckily, God was with her. They got to safety, and she came home. But she came home different. Those thugs took my daughter's innocence and trust. And it is a pain that will never ever go away from my family.

As I mentioned, especially with the girl from the gym, sex traffickers use emerging technologies to help them obtain an advan-

tage and to stay hidden from law enforcement and families. As I mentioned, Snapchat, an example, a 6-second video pops up, pops away. Bitcoin for online transactions.

My question for the entire panel—I will start with you, Ms. Smith—if I can make you the king, the queen, for one day to end human trafficking, what would you do?

Ms. SMITH. I only have 5 minutes.

Mr. OLSON. I can take whatever the chairman gives me.

Ms. SMITH. First, let me say, my heart goes out to you. I sit across from parents with some regularity who didn't have an almost, whose children were trafficked, and it is one of the hardest things in my job to do. So I am glad your story was an almost.

From my perspective, I see the devastation in lives of young girls, primarily girls. I see, even after they come out of trafficking, the fear they have that their images are still up online, and who might find them and who might see them, and parents have those fears, too, when there are parents involved. And even looking ahead, as we are trying to help them heal, they are worried about whether their employer is going to see those someday or their children or their potential spouse. So they are just tentacles that go out in this technology.

So I think you have alluded to some of those things. The anonymity, the ease of the marketplace, has to be shut down. We can't—you know, I heard somebody tell me this story: If you take it out of the internet and you say, "In that hotel over there, we are going to have children being raped and sold so that we can go and, you know, find them, use them as live bait," so to speak, we would be appalled. But we are OK with doing that if it is on the internet; somehow that is different.

So we have got to have mandatory privacy controls. As long as we don't have those privacy controls, predators are going to exploit our children. Children are going to lie about their ages to get accounts. So we have got to have that. We have got to get rid of the anonymity. I am a big believer in free speech but not in letting people rape our children. That is a simplistic answer, but—

Mr. OLSON. And I am out of time.

I yield back. But one final comment. Those guys are so bad with Snapchat. They would send this young girl, "OK, the drugs are on the car tire in the school parking lot on the fifth car that is a red Impala on the back rear tire." That would pop up for 6 seconds and then pop away; you can't track it. They are devils. Absolute evil devils. And thank God put you to stop this thing. It has to stop—has to, has to, has to stop. My daughter was lucky. She came home. But, as you mentioned, most daughters aren't that lucky. They don't come home. And that is terrible, terrible, terrible. Thank you for coming today.

I yield back.

Mrs. BLACKBURN. The gentleman yields back.

Ms. Eshoo, 5 minutes.

Ms. ESHOO. Thank you, Madam Chairwoman.

Thank you to all the witnesses that are here today. A special welcome to Professor Goldman from home, from Santa Clara University, that we are all very proud of. Professor Goldman, when I read the reports about backpage.com, I was really just absolutely

disgusted by their business model. I think we need to be enforcing the law, obviously, to the fullest extent, when it comes to websites that are promoting sex trafficking.

But with that in mind, I want to clarify something about section 230. And I read your testimony, and much of it is centered in and around section 230. Under that section, does anything stop the Department of Justice from bringing a criminal case against sites like Backpage.com, and are there other ways besides civil cases that victims can seek redress? That is my first question.

Mr. GOLDMAN. The first question—the first part is, no, nothing would restrict the Department of Justice from bringing an enforcement action against anyone, Backpage or any of the other sites that have been referenced.

Ms. ESHOO. Have they?

Mr. GOLDMAN. We have the grand jury investigation that has been taking place in Phoenix, and we don't know what the result of that is because of the nature of the grand jury investigation. It seems safe to say that Backpage surely is on their radar screen, but how that translates into a prosecution decision is beyond my expertise.

Ms. ESHOO. You don't know that yet. Uh-huh. Can you make any suggestions to us about how websites and tech companies can take it upon themselves to be proactive and find other ways to be proactive about fighting sex trafficking? Isn't that what 230 civil immunity is designed to incent?

Mr. GOLDMAN. Yes, it does. And I liked how Ms. Smith referenced it. It does take a partnership of all the players to combat sex trafficking. We need everybody on the fight, including the technology companies. And to get their willingness to undertake initiatives requires that they aren't held accountable for making mistakes or for not being instantaneous in their response or for the other kinds of things that are natural in an environment where users are posting lots and lots of content.

So section 230 is an integral part of the solution by making sure that we have provided the kind of legal framework that motivates the companies to do the work that we want them to do.

Ms. ESHOO. Thank you.

The bill that our colleague came to testify on is obviously intended to reduce the placement of antisocial content, like sex trafficking ads, online. But could, in your view, it be counterproductive, in other words, increase the appearance of such content? I mean, can you explain in the little more detail how that would work?

Mr. GOLDMAN. Yes. And I appreciate the opportunity to clarify that because it is counterintuitive. You would think that if we banned content and made more people liable for them, we will get less of the objectionable content. But that assumes that the existing services continue to do the work that they are already doing. But if we change the liability structure on them, they might decide that the best choice for them is to do less of the kind of policing and moderation work that we already are counting upon.

So, while we might be able to take care of some players by driving them out of existence, we might also create other players who choose to do little or none of the work that we expect them to do. And if that is the result, if those players turn off their policing ef-

forts, then they create more environments where the antisocial content can occur.

Ms. ESHOO. That is very interesting. Do you know of any examples where online services have used the flexibility granted by 230 to help combat online sex trafficking or similar crimes and, if so, how effective these efforts have been?

Mr. GOLDMAN. I don't have the details on that. In fact, some of my copanelists here might actually have more information on that.

Ms. ESHOO. Mr. Souras, do you know?

Ms. SOURAS. Yes, absolutely. You know, from NCMEC's perspective, we can certainly attest to the tremendous value that our technology partners provide, especially in the child sexual exploitation or child pornography realm. The developments of tools, hashing, the ability to utilize very advanced analytical comparisons and connections between images and data and video has definitely not only increased our report load tremendously at NCMEC, but it means that more and more content relating to child sexual exploitation has been reported to us. That work in the bulk of it came after the mandatory statute was put into place requiring technology companies to report apparent child pornography to NCMEC.

Ms. ESHOO. Thank you.

My time has expired, and I yield back.

Thank you to the witnesses very much.

Mrs. BLACKBURN. We thank the gentlelady.

Mr. Bilirakis, 5 minutes.

Mr. BILIRAKIS. Thank you, Madam Chair.

I appreciate it very much. Thank you for holding the hearing, and I appreciate the testimony of the panel. And, of course, Mrs. Wagner is doing an outstanding job on this issue. I am glad to see this is her priority.

I have a couple questions, but in response to increased sex trafficking around the world and in the Tampa Bay area—I represent the Tampa Bay area or parts of it in Florida—our local leaders established the Pasco County Commission on Human Trafficking in 2014. Over the last 3 years, the commission has helped to educate over 500,000 Floridians, trained over 3,000 community members, and saved many victims from their captors.

Recently, the commission held its first meeting to specifically address online sex trafficking. Partnering with local universities and the Pasco County Sheriff's Office, they are gathering data on local online trafficking networks in the Tampa Bay area, and it is a big problem in our area.

So my question is—my first question is to Ms. Smith. Based on your experience, what recommendations do you have for communities around the country that are beginning to target the online aspects of sex trafficking? And are there experienced organizations they should reach out to as they move forward?

Ms. SMITH. Well, I applaud you for the efforts in your home State. I think that a lot of people are well-intentioned and go in and just have knee-jerk reactions. So it is important that there be a professional approach to this, as with any other, so that there is a needs assessment that you have the professionals in place who are best qualified to address each of the components of your—of the problem you are tackling, whether that is internet or not.

You need the kind of collaboration that we talked about in our State, where legislators are getting educated, law enforcement is getting educated, the courts; where there is a unified system where people are talking to each other and not at crossroads; where you are defining what your issues are, and not comparing apples and oranges. There is some foundational work that I think you have to do around the issue of trafficking before you can even move to the online aspects.

I think it is important that you have survivor voices who are talking about the ways that they were trafficked and the effects on their lives and their concerns, the legal issues that they are facing. But I think some of my colleagues here might be even better in a position to—

Mr. BILIRAKIS. OK. Sure.

Ms. Souras, would you like to begin?

Ms. SOURAS. Yes, thank you.

I certainly agree with everything Ms. Smith related. I think—you know, one of the things that is important, and NCMEC always says this, is that sex trafficking is a multifaceted problem; it requires a multifaceted solution. So certainly the community awareness and the use and the listening to survivors and what they have gone through and the use of peer-counseling. And, again, learning from and using the experiences of those who have gone through this so that we can learn how to better educate on prevention and awareness and signs of trafficking to everyone that comes into contact with children, in addition to the judicial system and the healthcare system as well.

Mr. BILIRAKIS. We have got to beat this together. It has got to be a collaborative effort, there is no question. I wish everyone could respond, but I want to move on to my next question because I don't have very much time.

While technology has been a facilitator to traffickers, it also has put innovation into the hands of law enforcement. Mr. Winkler, you mentioned your use of the Spotlight software to help identify traffickers in a crowd of online posts. Can you expand on how this technology works and its success for the Bureau, as it might benefit our commission on human trafficking as they begin online monitoring for this illegal behavior?

Mr. WINKLER. Yes, sir. My understanding of Spotlight is it is an algorithm or overlay that looks for ads that are posted online, where there is a strong likelihood that those ads have been posted by minors or somebody has posted minors for—or posted ads for minors. It is a tremendous tool for us in law enforcement. Our intelligence analysts and our agents who are assigned to conduct human trafficking investigations use that tool almost on a daily basis in an effort to identify human trafficking victims.

So any type of technology like Spotlight that would help us in the furtherance of our investigations and in the furtherance of our efforts to combat human sex trafficking would certainly be welcome.

Mr. BILIRAKIS. Thank you.

Thank you, Madam Chair.

I want to thank the witnesses for their, obviously, participating today and protecting our Nation's vulnerable population. We really appreciate it. And I encourage Tampa Bay residents to visit

KNOW—and, again, spelled K-N-O-W—MORE PASCO, know more information, KNOW MORE PASCO, on Facebook or Twitter to learn more about what the community is doing to combat these predators.

Thank you very much. And I thank my community for taking action. I yield back.

Mrs. BLACKBURN. The gentleman yields back.

Mr. Rush, you are recognized for 5 minutes.

Mr. RUSH. I certainly want to thank you, Madam Chairman, for your courage in terms of having this hearing, and I want to commend you for your work and leadership in this particular matter. Child exploitation is pandemic through this Nation and is indeed a seedy dark side of our culture.

And I want to see from a different perspective how—what role does child marriage play in this crime? It seems as though there is another aspect of this crime that really has not been discussed at all, and that is for child marriages to occur.

Do you find or can you speak to this issue at all? Anybody? I mentioned something—I have some legislation that I am addressing to deal with the language of standards for our Nation to have as it relates to child marriages. There are so many different standards State by State. So we are trying to create a common standard through legislation. Do you have any—can you respond at all? Anybody? All right. Well, let me—

Ms. SMITH. I am sorry. I am getting older and hard of hearing, so I may have missed some parts of that. You were asking about child marriage and—

Mr. RUSH. I am asking about child marriages.

Ms. SMITH [continuing]. And trafficking. I would say that we have had limited experience with that. It is typically a foreign national victim. We do have a current survivor we are serving who was sold at the age of 14 to be married, and her husband brought her here and trafficked her. It was just an out and out trafficking situation. She managed to escape, and we are providing her services.

But in the years in which I have worked here—I did work internationally and came across that issue quite a bit—but domestically, it is a relatively small percentage.

Mr. RUSH. Well, I have heard and some of our researchers have said in some parts of our Nation, it is very common that young girls particularly are forced into marriages in order to satisfy the laws that prohibit interstate transfer of minors for sexual exploitation. So child marriage is an issue in certain parts of our Nation.

Let me ask you another question. Is there—have you noticed, is there a racial component to sexual exploitation of youngsters? Is there a racial component?

Ms. SMITH. I don't have those figures at my—those at my fingertip. I would be happy to get the information and send it to you later. I do know that there is a higher percentage of African-American victims. We certainly see lots of Latina, but I am sorry; I don't have the percentages, and I don't believe any of us probably do.

Mr. RUSH. All right. We, in recent days, have been highly focused on sexual harassment in the workplace and also in professional settings. And it seems as though there is a predominance in the news

today and in recent days about sexual exploitation and harassment in the workplace and in professional settings.

How is this affecting our national focus on children who, in most instances, are far less powerful and are more vulnerable because they are more voiceless? Are you seeing—are you seeing any kind of lessening of the attention on child sexual harassment because of the predominance in the news on harassment in the workplace and in professional settings?

Ms. SOURAS. Congressman, what we handle in NCMEC is obviously a much more severe type of child sexual exploitation. But, you know, I will say I think the public attention, the media counts, as you noted, around this issue, do create an environment for additional discussion that we can have with our children, with vulnerable populations.

Again, just regarding communication, being open to reporting. We are seeing some of these same trends with adults in professional settings. I think perhaps it is too early to know how that might filter down into some of the vulnerable populations that we work with here.

Mr. RUSH. I yield back.

Mrs. BLACKBURN. The gentleman yields back.

Mr. Long, 5 minutes.

Mr. LONG. Thank you, Madam Chairman.

This is a tough hearing to sit through. And what is the rate, or do you have any statistics on the rate of recidivism? I mean, you are talking about mostly girls, let's say, that are in this—I know there are some LGBTQ, whatever—but mostly girls that are trafficked. And you say that they mostly come from State homes, correct? From the State system?

Ms. SMITH. [Nonverbal response.]

Mr. LONG. So Mr. Winkler goes up there and busts them with his program. Where do they go from there? I mean, they don't go to a house with a white picket fence and a dog in the yard and have apple pie that night. What—is there a recidivism? Do we know anything about that?

Ms. SMITH. I can just speak experientially from our State, and it depends on—if you are counting recidivism as returning to that life of exploitation?

Mr. LONG. Right. That is what I am asking. How do you break that cycle for that age group, for those people? I mean, not the next age group coming, or whatever, but how do you take them—you know, rescue them from that, which we all want to do? Then what happens?

Ms. SMITH. I think that we found a terrific model in our State. Currently, we have an 89-percent success rate for the people that we serve not going back into exploitation. I am not going to say it is not incredibly difficult. I believe I read that the national average is that a girl typically running runs back to exploitation seven times. Thankfully our rates are much lower than that.

Mr. LONG. Seven times?

Ms. SMITH. Seven times. You know, there is some—there is complex trauma going on here.

Mr. LONG. I know. I mean, that is part of the——



Ms. SMITH. But, thankfully, I think some of the reasons we have had success are we have survivors on staff who build that trust and who mentor, who show visibly: This does not have to define your life. I am a professional woman. I am married. I have children. I have a college degree. This does not have to define your life.

That is a first step.

I think the fact that we keep very small caseloads, because these girls typically are looking for relationships. They were exploited because they want love and acceptance, things all of us want, but they have that deep need. So you can provide services all day long, but if you don't build that community of other survivors that they live with and the support groups and the relationship with staff and starting to build their outside support system, they are going to go back to have that need met in the only way they have ever known.

And I think those are keys to our success. I think it takes time. We can't rush this. We tend to do that. And especially child services: 2 months, 3 months, and that is all there is funding for.

Mr. LONG. Let me give each of you about 45 seconds to answer, start with Ms. Souras: What are the top three things we as Congress, two or three things, that we need to do to help you?

Ms. SOURAS. I think the number one thing is really, quite honestly, the topic of this hearing. There need to be legal tools that can effectively break the commercial market, the commercial market that these girls run back to, as Ms. Smith indicated, that they are lured back into to be trafficked, and the same market that, again, is feeding between 9,000 and 10,000 reports of child sex trafficking to NCMEC a year, and there is no decrease in those reports. Something at a high level needs to happen so that these websites can be taken down.

Mr. LONG. OK. Go ahead.

Ms. SMITH. I will just add with a little vignette: I have a 15-year-old this week who just got her privileges back online, because we have a tiered system for that. And the same day she got those privileges, a 40-year-old man was reaching out to her. And she said, "I am a minor," and he said, "That is fine." We see that over and over again. So I just concur.

Mr. LONG. This Backpage.com or whatever it is, is this—I mean, I have heard of it a million times, but I have never looked at it. Is it—you buy bicycles and couches and refrigerators there, and then there is also a trafficking section, or how does it work? It is not all trafficking, right?

Ms. SMITH. No, it is not all trafficking, but it is hidden under euphemisms: Buy a girl for 40 roses. Everybody knows that means \$40. It is very blatant. The pictures are very sexualized. There is not really much attempt to hide what is going on.

Mr. LONG. OK. Mr. Winkler.

Mr. WINKLER. Anything that encourages innovation in technology that would assist us in conducting the investigations that we conduct, that would assist us in furthering those investigations and helping us to identify trafficking victims, anything, whether that is targeted funding or just whatever, anything that you could do along those lines would be—

Mr. LONG. Mr. Goldman, I am over time, I am going to give you—I am going to yield myself 45 seconds that I don't have because I want to hear from you.

Mr. FLORES. I object.

Mr. GOLDMAN. I appreciate that. I do defer to the experts on this. I think if we could clone my three copanelists here, that would be a big step forward.

Mr. LONG. Thank you. I yield back.

Mrs. BLACKBURN. The gentleman yields back and didn't use that 45 seconds he gave himself.

Mr. Flores, you are recognized for 5 minutes.

Mr. FLORES. I hope that means I get 5½ minutes.

Thank you, Madam Chair.

And I want to thank the panel for being here today.

And I have to echo Mr. Long's comments: This really is a sad hearing to go through this. But I do appreciate your being here to talk about this ugly blight on American society.

Mr. Winkler, I want to follow up on one of the questions that Mr. Bilirakis introduced. He talked about your use of the tool Spotlight. And from what I understand now, as the trafficking business, if you will, is moving from text and photos to live streaming and video, it is my understanding that technology, the Spotlight types of technology, have not kept up. What sort of a challenge does that present to you?

Mr. WINKLER. I don't know specifically of challenges that we are faced with yet. I do know that there is a shift from the text format to video and streaming, and that it certainly is something that is on the horizon, if it is not already here.

Like I said before, anything that you can do that would assist in fostering innovation in that area would be most helpful.

Mr. FLORES. I have to agree with you, I think that is one of the things that we as policymakers need to do, but not through legislation necessarily, but through encouragement, is to help get the best and brightest in Silicon Valley and throughout the technology ecosystem to help develop tools to help you stop this terrible crime that is being inflicted on our young people.

Ms. Smith, I appreciate what you do. There is a group that started in Waco, Texas, called UnBound, and they do great work, and they deal with the victim side. And one of the neat things I have seen in our community is that they have brought law enforcement into the tent and have educated them about what is, I mean, what—these folks are victimized and what is happening to them. And they have formed a collaboration where Sheriff Parnell McNamara, the sheriff of McLennan County, has set up a sting system like the ones that you all talked about—like Mr. Winkler talked about. And, unfortunately, business is booming, but it is making a dent. From what I understand, the traffickers are no longer stopping in Waco, Texas, but that doesn't mean that they have gone away. They are just in other areas.

So I want to continue with you, Ms. Smith. We have heard a lot today about the terrible consequences of how easily victims can be lured into sex trafficking, but we haven't talked a whole lot about what can be done to stop exploitation in the first place. So can you

talk about your organization's prevention efforts and how technology can be used to stop exploitation before it starts?

Ms. SMITH. Great question. Thank you. We are doing a lot around prevention. We have reoccurring small groups facilitated by a therapist and a survivor with the high-risk kids, you know, interactive groups with middle-age—middle school and high school students. But I think when we are talking about prevention, what we have to be talking about is demand reduction. And so because TBI does what they do, in our State, if somebody picks up the phone to call for sex, they know on the other end of the phone might be law enforcement, whether they are in the city, the county, suburbs, small towns, wherever they are. They know that laws are strong, and they know that their picture might go out on a press release, and their wife and their boss and the people they go to church with might see that. Those are strong deterrents.

I know some sites—law enforcement sites actually put out the pictures so everybody can see. You know, that is the kind of thing we need to have happening if we are going to actually prevent this.

And then we have just got to limit the marketplace, just as we have been talking about. As long as there is anonymity, as long as these exploiters can get by with what they are doing, prosecutors don't have the tools to go after them; law enforcement will lose motivation if there is not a legal process that works. That is what we really to have do, I believe.

Mr. FLORES. We have got about 30 seconds, but what can be done from a technology perspective, do you think, to help stop the exploitation? Do you have a feel for that? That was for you, Ms. Smith. I am sorry.

Ms. SMITH. I am sorry. Would you repeat—

Mr. FLORES. So what can be done from a technology standpoint to stop the exploitation?

Ms. SMITH. Well, you know, some of the things we have been talking about are the privacy controls, the anonymity that is allowed online. I think we haven't talked about the fact that there are new sites popping up constantly. It is hard to even keep track of them. I believe we need to have the resources to keep on top of that and what is being done. But also law enforcement needs the resources to be able to get what they need for making good cases and getting perpetrators.

Mr. FLORES. Again, thank you all for your testimony today.

And I yield back the balance of my time.

Mrs. BLACKBURN. Mrs. Walters, 5 minutes.

Mrs. WALTERS. Thank you, Madam Chair.

And thank you to our witnesses for being here today. It is deeply upsetting that these issues exist in today's society, but I am grateful for the opportunity to discuss how we can put an end to this modern day slavery. I have worked on human trafficking issues since I served in the California State legislature since 2004. And while we have taken steps to curb this horrific practice over the last 13 years, much, much more must be done.

Trafficking is a big problem throughout California, as I am sure you are very aware. And a recent report by Polaris found that, in 2016, California had over 1,300 incidents of human trafficking, nearly double of any other State.

This heat map that I have shows the cases in California that were reported to the National Human Trafficking Hotline. But this map is just part of the picture, because it only reflects cases in which the location of the potential trafficking was actually known.

This year, in southern California, investigators have uncovered several large-scale international human trafficking rings that were using the internet to sell sexual services. And thousands of ads were tracked through the website that we are all familiar with, Backpage.com, including ads selling minors for commercial sex. Sadly, one of those rings was located in Irvine, which is right in the heart of my district.

The problem is so bad in Orange County that a group of law enforcement departments, Government agencies, nonprofits, and community organizations banded together to establish a task force to conduct antitrafficking efforts. In 2015, the Orange County Human Trafficking Task Force assisted 225 victims. Of the 225 victims, 61 percent were new victims, 168 of those victims were used for sex trafficking, 48 of those victims were minors, 47 of whom were used for sex trafficking. And the stats go on and on.

I am proud of the work that the task force has done and will continue to do so. With that, I would like to get to some questions.

Ms. Smith, you mentioned in your testimony that when the Tennessee Bureau of Investigations began investigating human traffickers, they called on your group for assistance. Do you think State law enforcement agencies have the expertise and resources to combat this problem on their own?

Ms. SMITH. No, I believe it takes the expertise of a number of players working together. So law enforcement does things I wouldn't dream of doing, investigating, researching, prosecuting, but I think we have to work together to have an approach that doesn't frighten the victims away, that meets them where they are, that brings survivors to the operations, for example, to build that trust. We have to have the services in place to keep a victim in place long enough to prosecute.

When I first started this work, I had a detective who said he was so frustrated with picking up the same 14-year-old girl all the time, and then he didn't know what to do with it. He lost his motivation. But now he is one of our most robust supporters because the system is working because all the pieces are in place. And so, you know, law enforcement is going out, and they are finding people. The community is getting educated so that they are being recognized by first responders. The services are in place that they need to heal. When that happens, it is a game changer.

Mrs. WALTERS. So what you are saying is that different partnerships are being formed in order to have that communication in order to make it work?

Ms. SMITH. Absolutely.

Mrs. WALTERS. And then, Professor Goldman, I have a couple questions for you. First, what evidence would a civil attorney need and expect to rely upon to establish that a website knew the individual advertised on the site was a minor?

Mr. GOLDMAN. I don't have an answer to that question in part because we haven't seen that issue thoroughly tested. Because sec-

tion 230 doesn't turn on a website's knowledge, we are unclear how a different legal regime might interpret that information.

Mrs. WALTERS. OK. We will see if you can answer my next question. I don't know if you will because, along the same lines, what evidence would a civil attorney need and expect to rely upon to establish that a website knew the individual advertised on the site was an adult sex trafficking victim?

Mr. GOLDMAN. Yes, I would answer it the same.

Mrs. WALTERS. OK. Thank you.

And I yield back the balance of my time.

Mrs. BLACKBURN. Mr. Costello, you are recognized 5 minutes.

Mr. COSTELLO. Thank you.

First, I want to thank the National Center for Missing and Exploited Children, who partnered with the FBI recently conducting their 11th Annual Operation Cross Country law enforcement action focused on recovering underage victims of sex trafficking. This cross-country sting was an operation, including 55 FBI field offices, 74 FBI-led child exploitation task forces, and 400 law enforcement agencies throughout the country, leading to the recovery of 84 sexually exploited minors and the arrests of 239 traffickers and other individuals, including 9 in my congressional district.

Now, I understand why the CDA provided immunity to ISPs in the first instance. I think there is an intellectual appreciation for why that was the case. But I, like some others on this committee, I am sure—and I have met with a mother whose daughter was advertised. And when you hear what these ads are and what is said, it really hits you in a way that compels you to say that is simply not acceptable, and we need to create a standard by which an ISP and others can be liable, or they have more of a responsibility than has thus far been required of them.

And so the question that I have is, can you talk about the successful efforts that were taken online during the operation and how, if at all, we can revise section 230 of the CDA to improve these efforts? I would point specifically to the reckless disregard standard that the information is in furtherance of a sex trafficking offense. I think that that is very helpful language in Mrs. Wagner's bill, as well as—and normally, we are a little hesitant to give State investigative authorities or State law enforcement jurisdiction over really internet-type related crimes because sometimes different States do different things at different times. But here, I think, by freeing it up and giving States more tools to do that, it is a good thing.

So, Ms. Souras, and anyone else on the panel, can you speak to that collaboration between local and Federal law enforcement and how the proposal may best aid them in rooting this out even more effectively than we have been able to do?

Ms. SOURAS. Thank you very much for the question, Congressman. And thank you for the recognition regarding the Operation Cross Country. It is an amazing operation that has been undertaken, as you noted, with a large variety of partners, local, State, and Federal. NCMEC provides some recovery services, as do local groups, in addition to some analytical support, and we are extremely proud to partner with law enforcement on that operation.

I think what you see in that operation and the numbers that you quoted, especially the numbers from your State of Pennsylvania, are really indicative of the scope of the problem. There could be an Operation Cross Country every week, every month, and the numbers would be the same. You know, I will defer to Mr. Winkler, certainly, to how there can be better resources put in place for law enforcement. But the way to really provide assistance and to cut those numbers are—and I will just repeat a little bit of what I said before—are to take this on from the highest level, to realize that there is a commercial marketplace where these children are commodities. And that is why there are so many children who are recovered and rescued during Operation Cross Country. It is why they are lured back in—you know, I think what Ms. Smith said, some children seven, eight times. That is also similar to what we see at NCMEC, because somebody can make money off of them.

And until we are able to introduce some laws—again, the FOSTA bill, you know, currently pending in the House; the SESTA bill that will soon be coming over to the House from the Senate, currently with 52 cosponsors in the Senate—most of those bills are, you know, approaching the issue from the same framework: adding more legal resources, State attorneys general, and civil remedies. That is really what you are going to start to see. You know, with new legal initiatives of that sort, that is going to be the solution to cut down on the number of children who are being lured because if it is too hard to break into the next Backpage, whatever that website might be—and Representative Wagner said there are hundreds. It is our experience as well, hundreds of—

Mr. COSTELLO. Real quick. How important is it for State and local prosecutors to be able to hold bad-actor websites accountable? How much more in the way of resources does that enable?

Ms. SOURAS. It is a tremendous benefit. I mean, State attorneys general in every State, you know, I imagine will look at this issue. Many of them have spoken to NCMEC, and they simply can't proceed legally right now.

Mr. COSTELLO. Right. Thank you very much.  
I yield back.

Mrs. BLACKBURN. The gentleman yields back.

And seeing that there are no further members wishing to ask questions, we thank you all so much for the testimony that you have given today.

As we conclude, I have two more submissions for the record. The opening statement of our ranking member, Frank Pallone. And an op-ed that I wrote this week that was printed in *The Tennessean*.

Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mrs. BLACKBURN. Pursuant to committee rules, I remind Members that they have 10 business days to submit additional questions for the record, and I ask, if they do and submit them to you, that you answer those questions within 10 business days.

And seeing no further business to come before the committee and the fact that we are now being called to the floor for votes, I adjourn the subcommittee.

So ordered. Thank you.

[Whereupon, at 4:12 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

While most of us spent this past holiday weekend with family and friends, victims of human trafficking and their families were forced to live a waking nightmare. Every day traffickers are forcing their victims—many of whom are children—to commit unspeakable acts. And while this practice seems like something from the ancient past, the situation is actually getting worse.

According to the National Human Trafficking Hotline, human trafficking cases increased by more than a third between 2015 and 2016. More than 2,300 of these cases last year involved trafficking children.

Even though this is a global issue, those statistics are not from far-flung corners of the world. Criminal sex trafficking is getting worse here in the U.S. In New Jersey alone, we had 83 cases reported so far this year. And the actual number of cases is probably much higher than what gets reported as traffickers move their activity to hidden corners of the web.

The internet undeniably has made the problem of sex trafficking worse. The same efficiency that can make the internet a powerful force for good in many ways can turn brutal when it is used in the sex trade. Some victims report traffickers forcing them to commit unspeakable acts 20 times a day. This simply should not be happening in this day and age. I salute my colleagues in both the House and Senate for proposing changes to existing laws to do more. Because more must be done.

A number of bills have been introduced in both chambers to combat online sex trafficking. Most proposals would modify Section 230 of the Communications Act—also called the Communications Decency Act. That's the section of the law that exempts websites from civil liability for third-party content posted on their site. Unfortunately, certain rogue websites use that section of the law to escape paying for the damage caused by their contributions to human trafficking.

I look forward to hearing today about which approaches work best to combat this terrible problem. And I welcome input on whether there are any ways to improve these proposals.

I know that some people worry that these bills may have unintended consequences. They correctly point out that the Communications Decency Act has allowed the internet to thrive. It has allowed web companies to aggressively police their sites for harmful content without fear of legal repercussions.

That's why the critics of altering the law worry that if we are not careful, we could undermine small businesses and unnecessarily harm startups that have nothing to do with human trafficking. Worse, they allege that if Congress does not act in the right way, we could unintentionally undermine the internet as we know it.

I understand these concerns, and I take them seriously. But we cannot ignore the fact that people around the world are being harmed everyday by this trafficking. The consequences are too severe.

That's why I welcome the help from the tech companies that have engaged productively in solving this issue and helping the victims. We all can and should do more. It's simply not acceptable to try to stop work on all legislation in the name of avoiding liability. We owe it to the victims. But more than that, we owe it to the people—adults and children—who will be victimized in the future if we do not act now.

Thank you, I yield back.

PREPARED STATEMENT OF HON. DAVID B. MCKINLEY

While the internet and e-commerce have revolutionized our lives in many ways, the staggering growth in this sector has allowed illicit activities to proliferate. Despite the majority of good actors online that are beneficial to the way we shop, communicate, and obtain information, we must pay more attention to companies and individuals involved in trafficking and smuggling of illegal goods and services. The rise of human trafficking and the online sex trade is a particularly abominable practice operating in the shadows—it is time for Congress and the Department of Justice to shine light on these bad actors to protect the victims of this industry from exploitation and enslavement. I commend the efforts of those testifying before the committee today and encourage Congress to continue working on legislative solutions that improve our ability to fight human trafficking and the sex trade. By modernizing our laws and enforcement power to reflect changing technology, we can better position the United States as leaders in the fight against these crimes against human dignity.



I

115TH CONGRESS  
1ST SESSION

# H. R. 1865

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 3, 2017

Mrs. WAGNER (for herself, Mrs. BEATTY, Mr. SMITH of New Jersey, Ms. CLARKE of New York, Mr. POE of Texas, Mrs. CAROLYN B. MALONEY of New York, Mr. ROYCE of California, Mrs. ROBY, Mr. KINZINGER, and Ms. JENKINS of Kansas) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*



1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Allow States and Vic-  
3 tims to Fight Online Sex Trafficking Act of 2017”.

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) Section 230 of the Communications Act of  
7 1934 (47 U.S.C. 230; commonly known as the  
8 “Communications Decency Act of 1996”) was never  
9 intended to provide legal protection to websites that  
10 facilitate traffickers in advertising the sale of unlaw-  
11 ful sex acts with sex trafficking victims.

12 (2) Clarification of such section is warranted to  
13 ensure that such section does not provide such pro-  
14 tection to such websites.

15 **SEC. 3. ENSURING ABILITY TO ENFORCE FEDERAL AND**  
16 **STATE CRIMINAL AND CIVIL LAW RELATING**  
17 **TO SEXUAL EXPLOITATION OF CHILDREN OR**  
18 **SEX TRAFFICKING.**

19 (a) IN GENERAL.—Section 230 of the Communica-  
20 tions Act of 1934 (47 U.S.C. 230) is amended—

21 (1) in subsection (b)—

22 (A) in paragraph (4), by striking “; and”  
23 and inserting a semicolon;

24 (B) in paragraph (5), by striking the pe-  
25 riod at the end and inserting “; and”; and

26 (C) by adding at the end the following:

1 “(6) to ensure vigorous enforcement against  
2 providers and users of interactive computer services  
3 of Federal and State criminal and civil law relating  
4 to sexual exploitation of children or sex trafficking,  
5 including through the availability of a civil remedy  
6 for victims of sex trafficking.”; and

7 (2) in subsection (e)—

8 (A) in paragraph (1)—

9 (i) by inserting “section 1591 of such  
10 title (relating to sex trafficking),” after  
11 “title 18, United States Code,”;

12 (ii) by striking “impair the enforce-  
13 ment of section” and inserting the fol-  
14 lowing: “impair the enforcement of, or  
15 limit the availability of victim restitution  
16 under—

17 “(A) section”; and

18 (iii) by striking “statute.” and insert-  
19 ing the following: “statute; or

20 “(B) any State criminal statute that pro-  
21 hibits—

22 “(i) sexual exploitation of children;

23 “(ii) sex trafficking of children; or

24 “(iii) sex trafficking by force, threats  
25 of force, fraud, or coercion.”;

1 (B) in the second sentence of paragraph  
2 (3), by striking “No cause of action” and in-  
3 serting “Except as provided in paragraphs  
4 (1)(B) and (5)(B), no cause of action”; and

5 (C) by adding at the end the following:

6 “(5) NO EFFECT ON CIVIL LAW RELATING TO  
7 SEXUAL EXPLOITATION OF CHILDREN OR SEX TRAF-  
8 FICKING.—Nothing in this section shall be construed  
9 to impair the enforcement or limit the application  
10 of—

11 “(A) section 1595 of title 18, United  
12 States Code; or

13 “(B) any other Federal or State law that  
14 provides causes of action, restitution, or other  
15 civil remedies to victims of—

16 “(i) sexual exploitation of children;

17 “(ii) sex trafficking of children; or

18 “(iii) sex trafficking by force, threats  
19 of force, fraud, or coercion.”.

20 (b) EFFECTIVE DATE.—The amendments made by  
21 this section shall take effect on the date of the enactment  
22 of this Act, and the amendment made by subsection  
23 (a)(2)(C) (and, to the extent it relates to such amendment,  
24 the amendment made by subsection (a)(2)(B)) shall apply  
25 regardless of whether the conduct alleged occurred, or is

1 alleged to have occurred, before, on, or after such date  
2 of enactment.

3 **SEC. 4. ENSURING FEDERAL LIABILITY FOR PUBLISHING**  
4 **INFORMATION DESIGNED TO FACILITATE**  
5 **SEX TRAFFICKING.**

6 (a) IN GENERAL.—Section 1591 of title 18, United  
7 States Code, is amended—

8 (1) by redesignating subsection (e) as sub-  
9 section (f);

10 (2) in subsection (f), as redesignated by para-  
11 graph (1), by adding at the end the following:

12 “(6) ‘The terms ‘information content provider’  
13 and ‘interactive computer service’ have the meanings  
14 given those terms in section 230 of the Communica-  
15 tions Act of 1934 (47 U.S.C. 230).

16 “(7) The term ‘participation in a venture’ in-  
17 cludes knowing or reckless conduct by any person or  
18 entity and by any means that furthers or in anyway  
19 aids or abets the violation of subsection (a)(1).”;  
20 and

21 (3) by inserting after subsection (d) the fol-  
22 lowing:

23 “(e)(1) Whoever, being a provider of an interactive  
24 computer service, publishes information provided by an in-  
25 formation content provider, with reckless disregard that

1 the information provided by the information content pro-  
2 vider is in furtherance of an offense under subsection (a)  
3 or an attempt to commit such an offense, shall be fined  
4 in accordance with this title or imprisoned not more than  
5 20 years, or both.

6 “(2) Nothing in paragraph (1) shall be construed to  
7 require the Federal Government in a prosecution, or a  
8 plaintiff in a civil action, to prove any intent on the part  
9 of the information content provider.”.

10 (b) CLERICAL AMENDMENTS.—Such section is fur-  
11 ther amended by striking “subsection (e)(2)” each place  
12 it appears and inserting “subsection (f)(2)”.

○



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November 27, 2017

The Honorable Marsha Blackburn  
 Chairman  
 Subcommittee on Communications and  
 Technology  
 U.S. House of Representatives  
 2125 Rayburn House Office Building  
 Washington, DC 20515

The Honorable Mike Doyle  
 Ranking Member  
 Subcommittee on Communications and  
 Technology  
 U.S. House of Representatives  
 2322A Rayburn House Office Building  
 Washington, DC 20515

Dear Chairman Blackburn and Ranking Member Doyle:

Thank you for holding a House Energy and Commerce Subcommittee on Communications and Technology hearing to address the critical issue of combating online sex trafficking. As an anti-trafficking attorney and adjunct professor at Notre Dame Law School, I have focused my research on the question of how regulating intermediaries (or interactive computer services) is likely to affect anti-trafficking and anti-exploitation efforts. I have worked closely with organizations in the Freedom Network, the largest domestic network of anti-trafficking advocates and service providers, to develop and implement effective policies to combat this atrocious crime. My expertise and experience lead me to believe that the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) will not reduce commercial sexual exploitation, and may, to the contrary, exacerbate the problem.

There is No Evidence that Internet Intermediaries Cause Sex Trafficking

Reports of sex trafficking have increased as the Internet has grown in size. While this correlation is often marshaled as evidence that the Internet has caused a rise in sex trafficking, it actually proves nothing of the sort. It may simply be the case that the Internet makes it easier to detect the crime. There is likewise no basis for the idea that the proliferation of intermediaries that host advertisements has prompted an increase in sex trafficking, and, conversely, no reason to believe that limiting them will reduce commercial sexual exploitation. FOSTA (and similar measures) may *appear* to target sex trafficking, but the reality is that they seek to suppress mechanisms through which sex trafficking is readily detected and reported. This is the exact opposite of what we need.

Intermediaries Should be Encouraged to Screen Material, Not Punished for It

Both law enforcement and non-profit advocates rely heavily on intermediaries to flag suspicious posts and potential trafficking activity. Unfortunately, intermediaries' ability to filter content is not flawless, and some sex trafficking advertisements do slip through the cracks. But thanks to Section 230 of the Communications Decency Act, the perfect is not the enemy of the good, and platforms do not have to worry that they will be held liable simply for making an effort. FOSTA would change this: by creating accountability for merely *knowing* about trafficking, FOSTA would punish platforms for their attentiveness.

Countless victims are recovered, and traffickers apprehended, because of platforms' efforts (however imperfect) to filter the content they host. It would be counterproductive to encourage platforms to turn a blind eye. Intermediaries have an important role to play in combatting sex trafficking -- but their power to stop these horrific acts is only as strong as their immunity from liability for their inevitable failures.

The Safety of Sex Works Depends on Online Platforms

A recent study suggests that the availability of certain online forums may be correlated with a lower murder rate among sex workers.<sup>1</sup> This echoes what sex workers and trafficking survivors have been saying for years: access to online platforms makes sex workers less dependent on pimps and violent third parties. Views can and do differ as to whether sex work should be legal, but there is hardly room for disagreement as to whether we should take measures to reduce violence -- including fatal violence -- in vulnerable populations.

I join the many anti-trafficking organizations, advocates, and survivors who have expressed reservations about efforts which, like FOSTA, confuse imposing liability on intermediaries with holding traffickers accountable.<sup>2</sup> While I applaud Congress's effort to contend with this serious issue, I am confident that FOSTA is not the solution.

Sincerely,



Alexandra F. Levy

<sup>1</sup> Cunningham et al, "Craigslist's Effect on Violence Against Women," available at <http://scunning.com/craigslist70.pdf>.

<sup>2</sup> The Freedom Network USA, for instance, issued an official statement urging caution when considering amendments to the CDA, and encouraging Congress to avoid "misguided legal reforms" (<https://freedomnetworkusa.org/buddydrive/file/fnusaorgscautioncdareform/>). The Sex Workers Outreach Project USA has also voiced strong opposition to similar measures (<http://www.new.swopusa.org/2017/08/11/call-to-actionpress-release-swop-usa-stands-in-direct-opposition-of-disguised-internet-censorship-bill-sesta-s-1963-call-your-state-representatives-and-tell-them-to-fight/>). Many other coalitions, organizations, advocates, and experts have expressed the same views.

**Response to Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations – October 3, 2017**

Shared Hope International, Exodus Cry, the National Center on Sexual Exploitation (NCOSE) and the Coalition Against Trafficking in Women (CATW) submit this statement in response to the October 3, 2017 hearing<sup>1</sup> on H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA),<sup>2</sup> to clarify the record with regard to testimony given by former Representative Chris Cox on behalf of NetChoice, and the Subcommittee's focus on technology industry perspectives that did not accurately represent the barriers in Section 230 to holding online entities that facilitate sex trafficking accountable for their role in this crime.

Notably absent from the hearing were the voices of survivors of trafficking—those who have experienced the devastating effects of commercial sexual exploitation as a result of being bought and sold on websites that prompted the introduction of H.R. 1865—and some of the undersigned organizations already protested this serious oversight by the Subcommittee<sup>3</sup> which convened the hearing in order to make critical decisions about a law that directly impacts sex trafficking survivors.

A similarly glaring omission was the failure to hear from sex trafficking victim advocacy organizations that have spent decades fighting to protect the rights of sex trafficking victims, or from law enforcement agencies that combat this crime and fight to protect victims every day.<sup>4</sup> During the hearing, Professor Mary Leary, who has substantial expertise in issues related to child protection and victims' access to justice, provided a critical window into the perspective of victim advocates and law enforcement, but she was repeatedly passed over by members in favor of hearing the concerns of former Congressman Chris Cox, who testified on behalf of NetChoice, a technology trade group that represents the interests of internet companies. While we do not dispute that the complex nature of this legislation requires a balancing of interests, the Subcommittee failed to strike that balance by **choosing instead to rely on technology industry advocates to advise the Subcommittee on how to combat sex trafficking**. NetChoice, for example, was allowed to present a self-described “novel legislative approach to addressing the problem of sex trafficking.”<sup>5</sup>

<sup>1</sup> *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations*, 115 Cong. (Oct. 3, 2017).

<sup>2</sup> H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking (FOSTA).

<sup>3</sup> Letter from Coalition Against Trafficking in Women (CATW), Exodus Cry, National Center On Commercial Sexual Exploitation (NCOSE), Shared Hope International, and Survivors for Solutions to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017).

<sup>4</sup> Notably, when the Senate Commerce Committee held a hearing on S. 1693, the *Stop Enabling Sex Traffickers Act of 2017* (SESTA), witnesses included the mother of a slain child sex trafficking victim who had been sold for sex on Backpage.com, and California Attorney General Xavier Becerra who is currently prosecuting Backpage executives and faced the dismissal of several state charges in that prosecution due to Section 230 immunity. *S.1693, The Stop Enabling Sex Traffickers Act of 2017: Hearing before the Senate Committee on Commerce, Science, and Transportation*, 115 Cong. (September 19, 2017).

<sup>5</sup> NetChoice Press Release, “NetChoice Calls On U.S. Congress To Leverage Full Extent of the Law to Pursue and Prosecute Online Sex Trafficking,” October 3, 2017.



The undersigned anti-trafficking organizations respectfully submit this joint statement for the purpose of correcting this imbalance. NetChoice’s testimony paints a picture of the statutory scheme Representative Cox may have envisioned when drafting the legislation in 1996, but NetChoice’s testimony misconstrues the actual caselaw interpreting Section 230 in the context of online facilitation of sex trafficking. Rather than the “clear fact-based test”<sup>6</sup> that NetChoice claims should be applied based on the “plain language of the statute,”<sup>7</sup> the way that courts have actually interpreted Section 230 with regard to online facilitation of sex trafficking has repeatedly undermined and essentially eviscerated the “clear test” that NetChoice states is in enshrined in Section 230. We also disagree with NetChoice’s assertion that amending Section 230 will undermine the goal of having a national standard for applying the protections of Section 230; indeed, clarifying Section 230 in the context of online facilitation of sex trafficking will resolve the conflict in existing caselaw and clarify the intent of the drafters—both of whom have testified on the record about how they *intended* for the law to be applied<sup>8</sup>—to ensure that courts will truly have a clear standard for deciding these cases in the future.

The Need For Statutory Clarification of Section 230 to Address Online Facilitation of Sex Trafficking:

Despite the intended goals of Section 230, the problem of online facilitation of sex trafficking is real, and the need to amend Section 230 to clarify its application in these cases is equally real, and severely overdue. **The test that NetChoice claims is already codified in Section 230<sup>9</sup> and would allow for companies like Backpage.com to face criminal and civil liability<sup>10</sup> is not actually codified in Section 230.** Instead, this “test” for determining when an interactive computer service provider can be considered an information content provider and consequently lose the protection of Section 230 immunity derives from caselaw. Specifically, the test that NetChoice describes appears to derive from the decision in Fair Housing Council v. Roommates.com,<sup>11</sup> a case that has not been followed in any of the cases against Backpage.com,<sup>12</sup> except one civil case.<sup>13</sup>

<sup>6</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>7</sup> *Id.* at ii.

<sup>8</sup> *Id.* at 1, 7; Testimony of Senator Ron Wyden, S.1693, *The Stop Enabling Sex Traffickers Act of 2017: Hearing before the Senate Committee on Commerce, Science, and Transportation*, 115 Cong. (September 19, 2017).

<sup>9</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>10</sup> *Id.* at 12-16.

<sup>11</sup> Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008).

<sup>12</sup> M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1052 (E.D. Mo. 2011); Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017); People v. Ferrer, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss (Aug. 23, 2017).

<sup>13</sup> J.S. v. Vill. Voice Media Holdings, L.L.C., 184 Wash. 2d 95, 103, 359 P.3d 714, 718 (2015) (“it is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under the CDA because ‘a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.’ Fact-finding on this issue is warranted.”) (*citing Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008)).

As NetChoice accurately points out, Section 230 defines an “information content provider” to include “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>14</sup> However, beyond providing this definition of a content creator, and providing immunity for interactive computer service providers by restricting liability to the information content provider as the creator of the content,<sup>15</sup> the statute itself does not set out a test for determining when an “interactive computer service” should be considered an “information content provider” and consequently lose the protection of Section 230 immunity. While development of content is referenced in the definition of a content creator, the statute does not define what it means to “develop” content,<sup>16</sup> and that is where the *caselaw* provides a patchwork approach, either employing a standard similar to the *Roommates.com* decision—as seen followed in defamation and business fraud cases<sup>17</sup>—or in the context of online facilitation of sex trafficking, employing standards that interpret development under Section 230 as extending broad immunity to interactive computer service providers despite evidence of the entity’s role in developing content, applying a definition of development that is so narrow that it would be virtually impossible to find that an online entity participated in the development of content if it did anything other than conceive, create and write the content itself.<sup>18</sup>

Considering this caselaw background, we must respectfully, but strongly disagree with NetChoice’s claim that Section 230 establishes a clear test for courts to decide if an interactive computer service provider has become an information content provider. NetChoice points to the First Circuit decision in *Jane Doe No. 1 v. Backpage.com LLC*<sup>19</sup> as an “apparent anomaly.”<sup>20</sup> This is simply inaccurate. It is precisely in the

<sup>14</sup> 47 U.S.C. § 230(f)(3); Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>15</sup> 47 U.S.C. § 230(c)(1) (“Treatment of publisher or speaker—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”)

<sup>16</sup> *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10<sup>th</sup> Cir. 2009) (“[Section 230] does not define the term development.”)

<sup>17</sup> NetChoice’s testimony claims that “it is well established in the case law that under Section 230, a website ‘can be both a service provider and a content provider.’” Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.15. However, this is far from established. While NetChoice notes six cases that have followed the *Roommates* standard, this sampling of cases does not include cases involving online facilitation of sex trafficking. With the exception of a state case involving child pornography, the cases cited by NetChoice are limited to defamation or unfair trade practices. See, e.g., *FTC v. LeadClick Media LLC*, 783 F.3d 158 (2d Cir. 2016) (unfair trade practice); *Vision Sec., LLC v. Xcentric Ventures, LLC*, No. 2:13-CV-00926, 2014 WL 582180, at \*1 (D. Utah Feb. 14, 2014) (online defamation and libel); *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1190 (10<sup>th</sup> Cir. 2009) (illegal trade of confidential telephone records); *eDrop-Off Chicago LLC v. Burke*, No. CV 12-4095 GW (FMOX), 2012 WL 12882434, at \*1 (C.D. Cal. May 11, 2012) (online defamation and trade libel); *Huon v. Denton*, 841 F.3d 733 (7<sup>th</sup> Cir. 2016) (online defamation).

<sup>18</sup> See e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1<sup>st</sup> Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017) (“[A]s long as ‘the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.’” (quoting *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1<sup>st</sup> Cir. 2007))).

<sup>19</sup> *Jane Doe v. Backpage LLC*, 817 F.3d 12 (1<sup>st</sup> Cir. 2016).

cases that have attempted to hold Backpage.com accountable for facilitating online sex trafficking that the courts have departed most dramatically from the development standard that NetChoice claims was intended to be applied. Not only have courts interpreted Section 230 as extending blanket immunity to Backpage.com—an online entity shown in a Senate Permanent Subcommittee on Investigations report to have knowingly facilitated child sex trafficking<sup>21</sup>—but these courts have specifically asked Congress to clarify Section 230 to avoid the unfair result that the courts say is dictated by the current statutory scheme.<sup>22</sup>

NetChoice’s testimony also suggests that the cases against Backpage would have reached a different result if the courts considering application of Section 230 immunity to Backpage had the evidence from the Senate investigation before them to consider in deciding Backpage’s role in developing content.<sup>23</sup> If the standard that NetChoice claims should have been applied was employed by these courts, any evidence that Backpage had a role in creating or developing content should have opened the door to a “fact-based inquiry”<sup>24</sup> to determine whether Backpage.com was a content creator. However, the lack of clarity in Section 230 regarding when an interactive computer service provider can be considered an information content provider prevented each of these cases from proceeding to the fact-finding stage. While the courts acknowledged the potential for Backpage to be liable if it is found to be a content creator,<sup>25</sup> the courts were unwilling to find that Backpage’s conduct as an interactive computer service provider could also constitute development of content and consequently remove it from CDA immunity. This confusion is probably most evident in the decision in People v. Ferrer where the court considered

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<sup>20</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.15.

<sup>21</sup> Backpage.com’s Knowing Facilitation of Online Sex Trafficking, Senate Permanent Subcommittee on Investigations, Staff Report (January 10, 2017).

<sup>22</sup> Jane Doe v. Backpage, LLC, 817 F.3d 12, 29 (1st Cir. 2016) (“If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.”); M.A. v. Village Voice Media Holdings, et al., 809 F.Supp. 2d 1041, 1058 (E.D. Mo. 2011) (“Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity.”); People of the State of California v. Carl Ferrer et al, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.18 (Aug. 23, 2017) (“[i]f and until Congress sees fit to amend the law, the broad reach of section 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.”).

<sup>23</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) pgs.15-16, footnote 41.

<sup>24</sup> Id. at 7.

<sup>25</sup> Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017) (“Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.”), People v. Ferrer, No. 16FE024013, p.18 (2017) (“This Court rejected the People’s claim that Defendants actually created the content that led to their ability to live and derive support and maintenance from prostitution proceeds, when the face of the complaint demonstrated that Defendants engaged in protected publisher functions.”), M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC, 809 F. Supp.2d 1041, 1044 (2011) (“M.A. describes Backpage as...[an] Information Content Provider within 47 U.S.C. 230 in that [Backpage] was responsible in part for the development and/or creation of information provided through the internet or other internet computer service in that...[Backpage] has posting rules and limitations which aid in the sight veiling of illegal sex services ads to create the veil of legality.”)

much of the same evidence provided in the Senate report<sup>26</sup> and still found that Section 230 immunity should be extended to Backpage, *even if it engaged in actual criminal conduct*.<sup>27</sup>

In *Jane Doe v. Backpage LLC*, the First Circuit interprets Section 230 as providing an “interactive computer service” an extremely broad veil of immunity for any conduct relating to content provided by another information content provider: “Though a website conceivably might display a degree of involvement sufficient to render its operator both a publisher and a participant in a sex trafficking venture (say, that the website operator helped to procure the underaged youths who were being trafficked), the facts pleaded in the second amended complaint do not appear to achieve this duality.” Contrary to NetChoice’s testimony which states that “the record before [the First Circuit] expressly *did not* allege that Backpage contributed to the development of the sex trafficking content, even in ‘part,’” the record reflects allegations that Backpage structured its website to facilitate sex trafficking which the court nevertheless found to be the actions of a mere publisher.<sup>28</sup> It was the court’s interpretation of the immunity provided to interactive computer service providers, rather than the lack of a specific allegation as to content creation, that led the court to extend broad immunity despite the “persuasive case” made by appellants and amici that “Backpage has tailored its website to make sex trafficking easier.”<sup>29</sup>

With regard to Section 230’s impact on state criminal prosecutions, one of the headings in NetChoice’s testimony is “Why Backpage cannot use Section 230 as a shield from state prosecution.” In addition to the inaccuracy of NetChoice’s testimony with regard to the cases attempting to hold Backpage civilly liable, three additional cases demonstrate how Section 230 directly blocks states’ efforts to hold Backpage, and similar entities, criminally liable under state law: *Backpage.com LLC v. Cooper*, *Backpage.com LLC v. Hoffman* and *Backpage.com LLC v. McKenna*.<sup>30</sup> In each of these cases, the state enacted a law that would have criminalized *knowingly* publishing, disseminating or displaying advertisements for commercial sex acts with minors<sup>31</sup>—conduct that is specifically criminalized under the federal sex trafficking law.<sup>32</sup> Almost immediately following enactment of each of these state criminal laws, Backpage.com and Internet Archive filed a lawsuit seeking to enjoin the statute based primarily on Section 230 immunity, and in each case, the court found the state statute inconsistent with Section 230,

<sup>26</sup> *People v. Ferrer*, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.16 (Aug. 23, 2017) (“The People allege that Defendants ‘manipulated’ advertisements to evade law enforcement detection. The People state, ‘In this way, rather than prevent a child from being sold for sex, the Defendants would knowingly profit from the child’s commercial sexual exploitation and assist the trafficker to evade law enforcement.’”) (citing Amend. Comp. at 26).

<sup>27</sup> *Id.* at 18 (Aug. 23, 2017).

<sup>28</sup> *Doe v. Backpage.com* at 21. (“Although the appellants try to distinguish *Doe* by claiming Backpage’s decisions about what measures to implement deliberately attempt to make sex trafficking easier, this is a distinction without a difference. Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.”)

<sup>29</sup> *Doe v. Backpage.com* at 29.

<sup>30</sup> *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013), *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at \*1 (D.N.J. Aug. 20, 2013).

<sup>31</sup> *Id.*

<sup>32</sup> 18 U.S.C. § 1591(a)(1) (“whoever knowingly advertises...”); *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 104 (D.D.C. 2016) (finding that advertisement of sex trafficking is not protected speech under the First Amendment).

demonstrating the broad immunity that Section 230 provides in the context of online facilitation of sex trafficking.

NetChoice’s claim that “[a]ny state or local criminal prosecution, and any civil suit, may therefore be maintained so long as it does not seek to violate the uniform national policy that internet platforms shall not be held liable for third party content created and developed wholly by others,” belies the actual national policy established under Section 230, a policy that protects online entities from *any potential* liability, regardless of the facts. Just as the civil cases against Backpage have been almost uniformly dismissed without an opportunity to engage in the fact-based test that NetChoice claims is required under Section 230, Backpage.com successfully blocked states’ attempts to codify state criminal penalties for conduct criminalized under the federal sex trafficking law merely because the laws *potentially* apply to online entities. Backpage’s success in enjoining these state laws immediately following enactment demonstrates the flaw of relying on a *Roommates*’ development standard as the sole solution to addressing Section 230 immunity for bad actors engaged in online facilitation of sex trafficking. Despite the possible effectiveness of this standard in the context of fraud, defamation and the other handful of cases cited by NetChoice, this standard is clearly ineffective in addressing the conflict between Section 230 immunity and the ability of states and victims to fight online sex trafficking.

When cases like those brought against Backpage.com have presented a scenario where online entities are shaping and directing the development of content originally created by another “information content provider,” and the courts have had to decide whether an entity could be both an interactive computer service provider and an information content creator, there is a distinct difference in how this determination is made in the cases addressing online facilitation of sex trafficking. *Roommates* went one way—deciding that participating in the development of content was enough to consider an interactive computer service a content creator—and the cases deciding whether Backpage.com could be treated as a content creator went the other way—holding that if it facilitated illegal conduct or even if it directly engaged in criminal conduct,<sup>33</sup> it was immune. With this dramatic split in the caselaw, the issue that is “clear” is the need to amend Section 230 to clarify how Section 230 applies to online facilitation of sex trafficking.

Resolving this conflict in the caselaw through statutory clarification in the context of online facilitation of sex trafficking is the focus of the current legislation. FOSTA also does *not* do *more* than that. FOSTA does not create a sex trafficking “carve out,” suggesting that sex trafficking is to be treated differently than other cases. Instead, FOSTA clarifies that the common sense interpretation of Section 230 that was intended to be applied by its original drafters but has been repeatedly shunned by the courts in the context of online facilitation of sex trafficking, was indeed intended to be applied in these cases.

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<sup>33</sup> See *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1052 (E.D. Mo. 2011); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017); *People v. Ferrer*, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.18 (Aug. 23, 2017).

FOSTA Will Help Clarify the National Standard:

By focusing on the area of law where Section 230 has been most harmfully misinterpreted to provide immunity for facilitating illegal conduct,<sup>34</sup> and in the most recent decision, *immunity for directly engaging in illegal conduct*,<sup>35</sup> FOSTA provides a targeted response to the various courts that have called on Congress to clarify Section 230 immunity in the context of online facilitation of sex trafficking. In this way, by focusing on the specific issue that has created confusion in the courts and led to egregiously unfair results for sex trafficking victims, FOSTA avoids a larger overhaul of Section 230 immunity that would require speculating the various circumstances where a court's interpretation of Section 230 could depart from its intended application. Indeed, the legislative history established by this legislation will also help to guide courts back to a common sense interpretation of Section 230 as other criminal or civil contexts arise that require guidance. If Congress fails to act however, courts will continue to follow established precedent and allow online entities that facilitate online sex trafficking to continue profiting from the exploitation of victims with impunity, and as the caselaw develops in new areas, the Backpage.com standard will likely be interpreted as the standard to be applied to other criminal activity occurring online.

FOSTA also does not impose new or additional duties on online entities. Under the standard that NetChoice testified was intended to be applied under Section 230, any online entity that does "anything to develop the content created by another, even if only in part," would be "liable along with the content creator." The standard of knowing or reckless conduct<sup>36</sup> under FOSTA does nothing to expand the application of this standard, but since courts have not applied this standard in the context of online facilitation of sex trafficking, FOSTA clarifies that immunity can be denied to online entities acting in *bad* faith. Entities like Backpage.com that are designed to contribute to the illegality occurring online would not be able to assert immunity under Section 230 while entities acting in good faith that do not contribute to the illegality and/or make good faith efforts to filter or remove illegal content, will have immunity under Section 230.

Lastly, NetChoice's claim that "existing federal criminal law suffices to prosecute the offenses of which Backpage is allegedly guilty"<sup>37</sup> reflects a lack of expertise regarding the complexity of sex trafficking

<sup>34</sup> As Prof. Mary Leary testified, this is "a new form of exploitation [that] has not only emerged on the internet, but is uniquely empowered by it." Statement of Professor Mary Leary to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.8.

<sup>35</sup> *People v. Ferrer*, No. 16FE024013, Ruling on Defendant's Motion to Dismiss, p.18 (Aug. 23, 2017).

<sup>36</sup> Statement of Professor Mary Leary to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.14 ("The standard of knowing or reckless conduct that furthers a sex trafficking offense is a clear one. Both are commonly understood concepts in criminal law and are challenging states of mind for an attorney to prove. Recklessness, for example, requires the prosecution to prove that the defendant 'consciously disregard[ed] a substantial and unjustifiable risk.' In assessing the risk courts are guided to consider the nature and circumstances known to the defendant. Finally, the defendant's disregard of the risk cannot be minor but must be of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. The standard of knowing is even higher in criminal law and requires proof that the defendant be practically certain his conduct will cause a venture of human trafficking.")

<sup>37</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.11.

investigations and the impact of this crime on sex trafficking victims as well as local communities. Combatting sex trafficking is not merely a federal issue in need of political will. Sex trafficking is an insidious, growing crime that thrives when our attention is turned elsewhere, and requires a multi-pronged approach to impact its growth. Limiting the array of potential responses to sex trafficking to solely federal criminal prosecution allows this hidden crime to grow where it is not addressed by all of the pressure points that can be brought to bear; civil and criminal, federal and state enforcement are needed and creating gaps in this response leads to what we have seen happen with the explosion of sex trafficking on the internet. Relying solely on federal criminal law to address online facilitation of sex trafficking is simply unreasonable and unfair to victims of sex trafficking who will continue to be deprived of a day in court to hold the entities that profit from their exploitation accountable. Moreover, even if a federal prosecution is brought against Backpage, that alone would not change the business model that Backpage exemplifies, because relying on federal prosecutions alone is not adequate to flip the risk-reward equation that is such a critical component of combatting sex trafficking. States would still lack the ability to address online facilitation of sex trafficking by other unscrupulous companies that are already expanding into this lucrative, low-risk space.<sup>38</sup>

The obstructive litigation arising from Backpage.com's exploitation of the Section 230 immunity and the pervasive confusion in interpreting how this immunity should apply in the context of online facilitation of sex trafficking have allowed Backpage.com to perpetuate its business model and amass enormous profits while sex trafficking victims continue to be bought, sold and serially raped through online platforms that profit from their exploitation. While we do not disagree with NetChoice's testimony that Backpage.com is a content creator,<sup>39</sup> there is no factual basis for its statement that "[s]ome *mistakenly* claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support sex trafficking."<sup>40</sup> As the caselaw resulting from attempts to hold such websites accountable demonstrates, this statement is simply inaccurate, and we must ask how NetChoice can make this statement in good faith knowing that Backpage.com has tied up state attorneys general and sex trafficking victims in litigation for years and years while it continued to profit from the exploitation of victims. Courts have made it clear that they need Congress to act in order to avoid the unfair results that we have seen in the cases against Backpage, and we cannot ask sex trafficking victims and states to wait several years longer to "let the courts get it right." As NetChoice testified, "Providing both criminal and civil law enforcement the tools they need to succeed in the courts is entirely consonant with maintaining the benefits of a vibrant internet." We could not agree more. It is time for Congress to act and passing FOSTA is the action that needs to be taken.

Respectfully submitted by the following organizations:

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<sup>38</sup> Rob Spectre, *I Support A Free And Open Internet. We're Making SESTA Harder Than It Needs To Be*, Hackernoon.com (Sept. 27, 2017) <https://hackernoon.com/i-support-a-free-and-open-internet-and-were-making-sesta-harder-than-it-needs-to-be-a687bbabe52e>.

<sup>39</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.14.

<sup>40</sup> *Id.* at 10.

Shared Hope International, Former Congresswoman Linda Smith, President & Founder

Exodus Cry, Benjamin Nolot, CEO/Founder

National Center on Sexual Exploitation (NCOSE), Lisa L. Thompson, Vice President & Director of Education and Research

Coalition Against Trafficking in Women, Taina Bien-Aimé, Executive Director



November 27, 2017

The Honorable Marsha Blackburn  
Chairman  
Subcommittee on Communications and Technology Committee on Energy and Commerce  
United States House of Representatives  
2152 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Blackburn:

We want to thank you for scheduling this important legislative hearing on H.R. 1865, the Fight Online Sex Trafficking Act of 2017 (FOSTA). The need for legislation to clarify Section 230 of the Communication's Decency Act (CDA) is urgently needed given the recent 1<sup>st</sup> Circuit ruling in *Doe v. Backpage*. That ruling held that **even if Backpage had participated in the crime of sex trafficking**, Section 230 shielded the company from the claims filed by child victims. We are greatly appreciative of the passion and dedication shown by Representative Ann Wagner, the lead sponsor of FOSTA. Representative Wagner fully understands the barriers Section 230 has created in the ability of state law enforcement and survivors to go after websites that are engaged in facilitating human trafficking.

However, we would be remiss if we did not express our objection to recent efforts by some in the tech sector to undermine this proposed legislation with alternatives that do not specifically address the Section 230 problem identified by not only the 1st Circuit Court, but other judges around the country. We want to be clear that those alternatives fail to respond to the urgency of the 1<sup>st</sup> Circuit decision and are not supported by our organizations. We will strongly and collectively oppose any such efforts that do not address the Section 230 problem.

It is important to note that the 1<sup>st</sup> Circuit Court, in its ruling, recommended that the children seek a legislative remedy and the children are working to do just that. We were thrilled when the Internet Association (IA), after its staunch opposition to any changes to Section 230, endorsed the Senate version of FOSTA, S.1693, the Stop Enabling Sex Traffickers Act of 2017 (SESTA) and the bill, which has 48 co-sponsors on a bipartisan basis, was passed unanimously by the Senate Commerce Committee. Please see Facebook's public commitment to this legislative clarification of Section 230: <https://m.facebook.com/sheryl/posts/10159461384670177?pnref=story>

We look forward to working with you, Representative Wagner, and the other 170 plus co-sponsors to ensure that we pass legislation that fixes Section 230 so that websites that are engaged in human trafficking will no longer be able to hide behind the CDA and will be held accountable for their actions.

Sincerely,

SHAREDHOPE INTERNATIONAL  
NATIONAL CENTER ON SEXUAL EXPLOITATION  
COVENANT HOUSE  
RIGHTS4GIRLS  
ENOUGH IS ENOUGH

COALITION AGAINST TRAFFICKING IN WOMEN  
 WORLD WITHOUT EXPLOITATION  
 NATIONAL ORGANIZATION FOR WOMEN NY  
 ECPAT USA  
 SANCTUARY FOR FAMILIES  
 WOMEN'S JUST NOW  
 THE VOICES AND FACES PROJECT  
 MY LIFE MY CHOICE  
 SAVED IN AMERICA  
 CONSUMER WATCH DOG  
 LYNCH FOUNDATION FOR CHILDREN  
 TRAFFICKING IN AMERICA TASK FORCE  
 NOT ON MY WATCH! SAFE HAVEN NETWORK INTERNATIONAL  
 NYC FAITH-BASED COALITION AGAINST HUMAN TRAFFICKING AND DOMESTIC  
 VIOLENCE  
 FREEDOM FROM EXPLOITATION, INC

Autumn Burris, Survivor/Leader – Survivors for Solutions  
 Rebecca Bender, Survivor/Leader – The Rebecca Bender Initiative  
 Jerome Elam, Survivor/Leader – The Task Force on Trafficking in America  
 Brooke Axtell, Survivor/Leader – She Is Rising  
 Jenelle Gordon, Survivor/Activist  
 Mary Mazzio and the I AM JANE DOE, Survivors and Families  
 Erik Bauer, Attorney for JS and the other Jane Does in *JS v Village Voice Media Holdings*  
 Gina DeBoni, Attorney for the daughter of Yvonne Ambrose  
 Autumn VandeHei, Activist  
 Barbara Amaya, CDA, PHD, Author, Advocate, Survivor

11/30/2017

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NOVEMBER 30, 2017

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## The Register-Guard

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 OPINION HOME
 

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GUEST VIEWPOINT

# Wyden blocks bill to stop online sex trafficking

BY REBECCA BENDER

*For The Register-Guard*

NOV. 29, 2017

**S**ex trafficking is talked about everywhere right now. Most of the time we never see it — so it must not be happening here in Oregon, right?

Wrong. With the advent of the Internet, traffickers and pimps have moved off the streets and are selling their “product” — mostly young girls — online.

Shocking, I know. But these children are just a click away. You can go right now on the regular Web (not the Dark Web) and order a human for sex to be at your door within 15 minutes. It happens in every town and city across Oregon in numbers that would make your head spin.

It's horrific, but we can no longer pretend it's not happening. We need to collectively wake up so that we can better protect our children.

How, exactly, are companies getting away with creating these awful websites where people are bought and sold without any penalty? Well, it's called the Communication Decency Act, specifically Section 230, also referred to as the CDA230. This law was passed back in 1996 before the Internet was anything like it is today, to protect companies from being liable for third-party postings.

Which made total sense. It wouldn't be right for me to get into trouble because some weirdo tried to sell drugs on the comments section of my blog. Nor do any of us want Facebook or Google to get in trouble for stupid postings people make every hour of every day.

But a lot has changed in the last 20-plus years. There are websites that make hundreds of millions of dollars a year facilitating sex trafficking (and other illegal activity), and our laws haven't caught up with them.

Recently, several sexually exploited children filed suit against one of these websites, Backpage, but their case was dismissed. The court stated that even if Backpage were engaged in the crime of trafficking, it was nonetheless protected by CDA320. The court advised survivors to seek a legislative solution. (Learn more in the Netflix documentary, "I Am Jane Doe.")

So a group of lawyers, survivors and activists got together with members of Congress and created an amendment to the CDA230 that would still protect all of our freedom and privacy, while targeting only the bad actors who are purposely creating companies and websites for illegal activity — especially when it comes to harming children.

This narrow, surgical amendment to the CDA230 was titled SESTA: The Stop Enabling Sex Trafficking Act of 2017. Companies that are criminally involved with sex trafficking should be prosecuted at the state and federal level. Companies that engage in this type of criminal

11/30/2017

Wyden blocks bill to stop online sex trafficking | Opinion | Eugene, Oregon

conduct should also have to answer to civil claims. Forty-eight senators have signed on to this bill because it makes sense to amend such an outdated law.

Sen. Ron Wyden, however, is not supporting the bill — and he actually demanded a hold on this critical legislation, citing privacy and censorship concerns. Having met with Wyden's staff on the need for victims to access justice, I am disappointed by his announcement. Wyden is alone in blocking this critical bipartisan legislation from being voted on by the full Senate — legislation that was unanimously passed by the Senate Commerce Committee two weeks ago.

Survivors of sex trafficking and commercial sexual exploitation know the deep and profound harm caused by sex trafficking. We lead organizations that provide services and advocacy for exploited individuals, and continue to see the irreparable harm caused by online sex trafficking.

It is time to hold these websites accountable for the harm that they cause — after all, we wouldn't allow someone to sell a child for sex on the street corner, so why are criminals able to do this online and hide behind the CDA?

SESTA is needed to help disrupt the purchase of sex online with children and trafficked persons. Every day, thousands of women and children are marketed and purchased online with ease and impunity. It is as easy to order sex with children and exploited adults as it is to order a pizza. SESTA would eliminate this judicial loophole so that companies like Backpage can no longer operate with impunity.

Oregonians, we need you to take a stand! Please write in, call, email Wyden and demand he support SESTA. Stand with us to provide victims of online sex trafficking with a pathway to justice.

He hasn't listened to survivors and activists, but he will listen to you. Go to [www.wyden.senate.gov/contact](http://www.wyden.senate.gov/contact) to demand Senator Wyden sign on to SESTA. Read more about the bill at [www.congress.gov/bill/115th-congress/senate-bill/1693](http://www.congress.gov/bill/115th-congress/senate-bill/1693).

*Rebecca Bender, CEO and founder of the Rebecca Bender Initiative, is the author of "Roadmap to Redemption." She serves as co-chair of the Oregon Department of Justice's Human Trafficking Advisory Council and is a survivor of human trafficking after being lured off the University of Oregon campus.*

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**Congress of the United States**  
**Washington, DC 20515**

April 3, 2012

Larry Page  
Chief Executive Officer  
Google, Inc.  
1600 Amphitheatre Parkway  
Mountain View, CA 94043

Dear Mr. Page:

As Members of Congress committed to combating all forms of human trafficking, we write to you with concerns about reports of Google's advertising practices. Recently, dozens of human rights groups called on the National Association of Attorneys General to investigate Google's advertising practices that these groups believe contribute to the problem of human trafficking in America and globally.

Whatever Google is doing or is not doing to prevent these sorts of advertisements from appearing on their properties, Google has not satisfied a significant number of human rights organizations who have a specialized understanding of how these ads contribute to the human trafficking of women and girls. We are particularly concerned that these human rights groups may have identified yet another area where Google profits from illicit activities such as Google's advertising of controlled substances for which your company paid a \$500,000,000 forfeiture to the United States last year.

Accordingly, we request that you provide us with answers to the following initial questions we have regarding these developments:

1. Apart from Google's donations to large human rights organizations, what is your company doing internally to ensure that sexually exploitative advertisements do not appear?
2. What is Google's stated internal policy regarding exploitative advertising? What evidence do you have that those policies are being complied with by both Google's internal and external advertising sales teams?
3. What steps does Google take to instruct its advertising sales managers, consultants, and other employees regarding the evaluation of advertisers of such exploitative marketing?
4. If Google were to determine that it profits from such advertising, what steps would you take to ensure those profits were publicly disclosed and then disgorged? Would that process require restating Google's earnings for past securities filings?

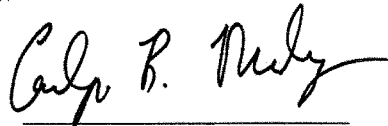
Online markets provide traffickers with the ability to reach untold customers across all political jurisdictions. As a global leader and innovator in internet technologies, Google is in a unique

position to do its part to fight human exploitation and trafficking, and we would encourage the company to proactively address these concerns.

We look forward to your reply and to engaging with Google cooperatively to stop human trafficking in America and around the world.

Sincerely,

  
MARSHA BLACKBURN  
Member of Congress

  
CAROLYN MALONEY  
Member of Congress



## Morgan Lewis

### Chris Cox

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November 30, 2017

### VIA ELECTRONIC MAIL

Honorable Marsha Blackburn  
Chairman, Subcommittee on Communications and Technology  
Committee on Energy & Commerce  
U.S. House of Representatives  
2125 Rayburn Building  
Washington, DC 20015

Honorable Michael F. Doyle  
Ranking Member, Subcommittee on Communications and Technology  
Committee on Energy & Commerce  
U.S. House of Representatives  
2322A Rayburn Building  
Washington, DC 20015

Dear Chairman Blackburn and Ranking Member Doyle:

At the invitation of the Subcommittee, I write to provide additional perspective as you consider legislation to more effectively combat sex trafficking via the internet.

As your former House colleague, together with then-Rep. Ron Wyden, I authored the Internet Freedom and Family Empowerment Act in 1995, which passed the House as a standalone bill that year and later became law as Section 230 of the Communications Decency Act. Having followed the development of the case law over the last two decades, I have been alternately pleased and disappointed with various judicial interpretations of the statute. Like many, many people, I am angered by the findings of the Staff Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com, and therefore frustrated with the success that Backpage has enjoyed (albeit not consistently) in fending off civil and criminal claims.

For these reasons, I completely support the current effort underway to ensure that courts understand what Congress intended when we voted for this legislation in the first place. As stated in the preamble to H.R. 1865, Section 230 "was never intended to provide legal protection

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Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 2

to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.” The internet, just like the mails, telegraph, and telephone before it, can be and regularly is used to commit crimes.

I agree with Chairman Blackburn that while the Senate bill “isn’t perfect,” and while the House bill requires “some more work,” Congress can “take a proactive step in protecting current and potential victims of sex trafficking” with well-drafted legislation. Crafting the legislative language carefully will be vitally important to ensure that courts do not again misread Congressional intent.

#### **Background and Purpose of Section 230**

When Rep. Wyden and I conceptualized the law in 1995, roughly 20 million American adults had access to the internet, compared to 7.5 billion today.

Those who were early to take advantage of this opportunity, including many in Congress, quickly confronted this essential aspect of online activity: many users converge through one portal. The difference between newspapers and magazines, on the one hand, and the World Wide Web (as it was then called), on the other hand, was striking. In the print world, human beings reviewed and cataloged editorial content. On the web, users themselves created content which became accessible to others immediately. While the volume of users was only in the millions, not the billions as today, it was even then evident to almost every user of the Web that no group of human beings would ever be able to keep pace with the growth of content on the web.

That year, on a flight from California to Washington, DC during a regular session of Congress, I read a newspaper account of a New York Superior Court case that troubled me deeply. The case involved a bulletin board post by an unknown user on the Prodigy web service. The post said disparaging things about an investment bank. The bank filed suit for libel, but couldn’t locate the individual who wrote the post. So instead, the bank sought damages from Prodigy, the site that hosted the bulletin board.

Up until then, the courts had not permitted such claims for third-party liability. In 1991, a federal district court in New York held that CompuServe was not liable in circumstances like the Prodigy case. The court reasoned that CompuServe “had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe’s computer banks,” and therefore was not subject to publisher liability for the third party content.

But in the 1995 New York Superior Court case, the court distinguished the CompuServe precedent. The reason the court offered was that unlike CompuServe, Prodigy sought to impose general rules of civility on its message boards and in its forums. While Prodigy had even more

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 3

users than CompuServe and thus even less ability to screen material on its system, the fact it announced such rules and attempted to enforce them was the judge's basis for subjecting it to liability that CompuServe didn't face.

The perverse incentive this case established was clear: any provider of interactive computer services should avoid even modest efforts to police its site. If the holding of the case didn't make this clear, the damage award did: Prodigy was held liable for \$200 million.

By the time I landed in Washington, I had roughed out an outline for a bill to overturn the holding in the Prodigy case.

The first person I turned to as a legislative partner on my proposed bill was my Democratic colleague, Rep. Wyden. We had previously agreed to seek out opportunities for bipartisan legislation. As this was a novel question of policy that had not hardened into partisan disagreement (as was too often the case with so many other issues), we knew we could count on a fair consideration of the issues from our colleagues on both sides of the aisle.

For the better part of a year, we conducted outreach and education on the challenging issues involved. In the process, we built not only overwhelming support, but also a much deeper understanding of the unique aspects of the internet that require clear legal rules for it to function.

The rule established in the bill, which we called the Internet Freedom and Family Empowerment Act, was crystal clear: the government would impose liability on criminals and tortfeasors for their wrongful conduct online. It would not shift that liability to internet platforms, except where the platforms themselves were complicit in the illegal online conduct, because doing so would directly interfere with the essential functioning of the internet.

Rep. Wyden and I were well aware that whether a person is involved in criminal or tortious conduct is in every case a question of fact. Simply because one operates a website, for example, does not mean that he or she cannot be involved in lawbreaking. To the contrary, as the last two decades of experience have amply illustrated, the internet – like all other means of telecommunication and transportation – can be and often is used to facilitate illegal activity.

Section 230 was written, therefore, with a clear fact-based test:

- Did the person create the content? If so, that person is liable for any illegality.
- Did someone else create the content? Then that someone else is liable.
- Did the person do anything to develop the content created by another, even if only in part? If so, the person is liable along with the content creator.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 4

The plain language of the statute directly covers the situation in which someone (or some company) is only partly involved in creating the content. Likewise, it covers the situation in which they did not create the content but were, at least in part, responsible for developing it. In both cases, Section 230 comes down hard on the side of law enforcement. A website operator involved only in part in content creation, or only in part in the development of content created by another, is nonetheless treated the same as the content creator.

Here is the precise language of section 230 in this respect:

The term “information content provider” means any person or entity that is responsible, in whole **or in part**, for the creation **or development of** information provided through the Internet ....

These words in Section 230 – “in part” and “development of” – are the most important part of the statute. That is because in enacting Section 230, it was not our intent to create immunity for criminal and tortious activity on the internet. To the contrary, our purpose (and that of every legislator who voted for the bill) was to ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others. If an interactive computer service becomes complicit, in whole or in part, in the creation of illicit content – even if only by partly “developing” the content – then it is entitled to no Section 230 protection.

Rep. Wyden and I knew that, in light of the volume of content that even in 1995 was crossing most internet platforms, it would be unreasonable for the law to presume that the platform will screen all material. We also well understood the corollary of this principle: if in a specific case a platform actually did review material and edit it, then there would be no basis for assuming otherwise. As a result, the plain language of Section 230 deprives such a platform of immunity.

We then created an exception to this deprivation of immunity, for what we called a “Good Samaritan.” If the purpose of one’s reviewing content or editing it is to restrict obscene or otherwise objectionable content, then a platform will be protected. Obviously, this exception would not be needed if Section 230 provided immunity to those who only “in part” create or develop content.

#### **The Importance of Section 230 for User-Generated Content**

The important task you have undertaken is to draft legislation to give prosecutors and civil litigants better tools to prosecute sex traffickers. In doing so, it will also be important to preserve the Good Samaritan protections for internet platforms that take action “in good faith to restrict access to ... obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material. This is central to the operation of Section 230. Without this protection, the perverse incentive will be for platforms to avoid any effort to monitor third party content –

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 5

the situation that would have existed had Congress not acted 20 years ago.

The language in H.R. 1865 as introduced does not fit well within the existing statutory framework. Instead of harmonizing with the Good Samaritan provision, it simply exempts “any ... Federal or State law that provides causes of action, restitution, or other civil remedies” related to sex trafficking. It also grafts onto Section 230’s objective test – was the defendant a content creator or developer, at least in part? – a new and very different test: did the defendant know, or should the defendant have known? (The latter is what courts often use as the test for recklessness.)

Section 230 is supposed to be about incentives. Congress should want to reinforce incentives for platforms to keep the internet free of obscenity and other objectionable content. The law recognizes that it would be impossible for most platforms to read all of the user-generated content to screen out objectionable material, and so does not penalize them for acting against only some of it.

If a new standard of “knew or should have known” is added to the mix, what does this do to the incentive to be a Good Samaritan? Now the platform intermediary can be second-guessed. This is the opposite of the Section 230 approach. If such language is added to Section 230, the law will be at war with itself. Undoubtedly the new language would win the war, trumping the Good Samaritan protection because of the opportunity for second guessing whether the website knew or should have known. In response to the new language, internet platforms might attempt to read all user-generated content, if they can (most could not); alternatively, they might go to great lengths to show (as CompuServe did back in the 1990s) that their business model is “anything goes” and thus they routinely screen out nothing. In that case they might more easily argue they should not reasonably be expected to have known about illegality in user-generated content. But the easiest thing to do would be to eliminate user-generated content, since that is the source of liability risk to the internet platform.

Even so, Congress might conclude that losing some user-generated content is a small price to pay for getting sturdier legal tools against sex trafficking. What is so important about user-generated content? Why, even as we strengthen prosecutorial tools to attack sex trafficking, is it necessary to protect website operators that are not involved in content creation from liability for content created by third party users?

Ensuring that liability is not shifted *from* criminals and tortfeasors who create illegal content and *onto* internet platforms is essential to the operation of the modern internet. This principle is the foundation supporting sites like Yelp, eBay, Wikipedia, Facebook, Amazon, Twitter, the New York Times, and every website that allows user comments, reviews, rankings, editorials, and so forth. User-generated content today powers thousands of innovative platforms that offer a range of socially useful services.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 6

Without the Good Samaritan and liability protection of Section 230, social media platforms would be exposed to lawsuits for everything from users' product reviews to book reviews. Airbnb could be sued for its users' unfairly negative comments about a rented home. Any service that connects buyers and sellers, workers and employers, victims and victims' rights groups, or any other community of interested people we can imagine, would assume substantial new legal risk if they continued to display user-generated content on their website.

How widespread is user-generated content? Over 85% of businesses use it. Over 90% of consumers find user-generated content helpful in making their purchasing decisions. Without it, people hunting for their loved ones at the peak of hurricanes Maria, Irma and Harvey would not have been able to use social media to that purpose. The millions of Americans who every day rely on "how to" and educational videos (for everything from healthcare to home maintenance to pre-K, primary, and secondary education and lifelong learning) would find that many of them have suddenly disappeared.

User generated content is vital to law enforcement and social services. Following this year's devastating Mexico earthquake, relief volunteers and rescue workers used online forums to match people with supplies and services to victims who needed life-saving help, directing them with real-time maps.

Given that user-generated content is important and worth preserving, is there a way to write a law that strengthens prosecutorial tools against sex trafficking, and also keeps today's positive incentives in place? There is.

#### **Protecting the Innocent and Punishing the Guilty**

Throughout the history of the internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 as originally written, though not always as interpreted, is such a balance. The plain language of Section 230 makes clear its deference to criminal law. The entirety of federal criminal law enforcement is unaffected by Section 230. So is all of state law that is consistent with the policy of Section 230.

Still, there is not an exemption of state criminal law from Section 230. Why did Congress not choose this course?

First, and most fundamentally, it is because the essential purpose of Section 230 is to preempt state law in favor of a uniform federal policy, applicable across the internet, that avoids results such as the state court decision in Prodigy.

Second, it is because the internet is the quintessential vehicle of interstate, and indeed international, commerce. Its packet-switched architecture makes it uniquely susceptible to multiple sources of conflicting state and local regulation. Even a message from one cubicle to its

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 7

neighbor can be broken up into pieces and routed via servers in different states. Were every state free to adopt its own policy concerning when an internet platform will be liable for the criminal or tortious conduct of another, not only would compliance become oppressive, but the federal policy itself could quickly be undone. All a state would have to do to defeat the federal policy would be to place platform liability laws in its criminal code. Section 230 would then become a nullity.

Congress thus intended Section 230 to establish a uniform federal policy, but one that is entirely consistent with robust enforcement of state criminal and civil law.

The key to writing new legislation in this area, then, is to avoid carving out exceptions for various state laws, without any means of harmonizing those laws with the federal policy. The best way to accomplish this objective is to give prosecutors better legal tools to work with, rather than simply carving up Section 230 in piecemeal fashion.

Specifically, I recommend that Congress and the states establish a new crime specifically focused on sex trafficking via website, with the purpose of giving federal and state prosecutors a powerful new weapon. State prosecutions of state law crimes with the same elements should be expressly authorized. As with the Travel Act, 18 U.S.C. 1952, the predicate offense can be defined as engaging in the business of prostitution, which presents prosecutors with fewer problems of proof. Sex trafficking, defined to include alternative elements such as a victim who is underage or who was subject to coercion, can then provide the basis for an enhanced penalty, allowing the criminal litigation to proceed to trial while the requisite facts are gathered.

To ensure that civil restitution is available to victims without need of commencing a separate follow-on civil proceeding, the new law should provide for a unitary proceeding, with the judge in the criminal trial assigned responsibility for overseeing claims for civil restitution immediately following the establishment of criminal liability. This will spare victims many months and much uncomfortable adversarial process.

By writing such provisions into the substantive criminal and civil law dealing with sex trafficking, lawmakers can avoid the thorny problems created by a single-crime carveout, which is the “narrowly targeted” but broadly problematic approach of HR 1865.

#### **Section 230 and Sex Trafficking**

The Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com has highlighted the fact that one website, estimated to be responsible for three-quarters of all sex trafficking activity in the United States, has thus far been able to operate with seeming impunity despite litigation brought by criminal prosecutors and civil plaintiffs. In lawsuits brought in state courts, Section 230 has figured as a staple element of Backpage’s defense.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 8

It bears repeating in this connection that Section 230 provides no protection for any website, user, or other person or business involved even in part in the creation or development of content that is tortious or criminal. Moreover, Backpage cannot rely on Section 230 as a shield from federal criminal prosecution because, by its express terms, Section 230 has no effect on federal criminal law. Section 230(e)(1) clearly states:

No effect on criminal law - Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

As this is a matter of black-letter law, your colleague Rep. Wagner, author of HR 1865, joined Rep. Maloney on July 13 of this year in formally stating, “we believe that the U.S. Department of Justice already has the tools it needs to bring a strong criminal case against Backpage.com.” Specifically, Congress recently passed, and President Obama signed, the Stop Advertising Victims of Exploitation Act of 2014 (the “SAVE Act”). The express purpose of this new federal law enforcement weapon is to clamp down on online marketplaces for the victims of the child sex trade and those forced to engage in commercial sex acts against their will. The statute covers any internet platform that knowingly distributes advertising for a commercial sex act in a manner prohibited under existing federal sex trafficking statutes. Additional federal tools include 18 U.S.C. § 1592(c)(3), covering facilitation of the promotion of unlawful activity, and 18 U.S.C. § 2255, providing for add-on civil suits by victims of sex-trafficking.

Unfortunately, to date no federal prosecution for sex trafficking has yet been brought under the federal SAVE Act. If and when a U.S. Attorney brings federal sex-trafficking charges against Backpage.com, the prosecution will face no restrictions whatsoever from Section 230.

Based on the abundant evidence in the Senate Report that Backpage participated in creating and developing the sex-trafficking content on its website on multiple occasions, Backpage should not be able to use Section 230 as a shield from state prosecution. Section 230, under the caption “State Law,” plainly states that it shall not “be construed to prevent any State from enforcing any State law that is consistent with this section.”

Any state or local criminal prosecution, and any civil suit, may therefore be maintained so long as it does not seek to violate the uniform national policy that internet platforms shall not be held liable for third party content *created and developed wholly by others*. Since no website operator who is responsible *even in part* for creating *or developing* content can hide behind Section 230, neither can Backpage.com.

For purposes of the following analysis, I will assume the facts as they are presented in the Senate Report. These detailed factual allegations about the illegal conduct of Backpage.com, if true,



Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 9

establish not only federal criminal offenses but also state criminal offenses. They also constitute a variety of both federal and state civil offenses.

Backpage, according to the Senate Report, systematically edits advertising for activity that is expressly made criminal under both federal and state law. Furthermore, Backpage proactively deletes incriminating words from sex ads prior to publication, in order to facilitate this illegal business while shielding it from the purview of investigators. Beyond this, Backpage moderators have manually deleted incriminating language that the company's automatic filters missed. Moreover, Backpage coaches its users on how to post apparently "clean" ads for illegal transactions.

Furthermore, according to the Senate Report, Backpage knows that it facilitates prostitution and child sex-trafficking. It knows its website is used for these purposes because it assists users who are involved in sex-trafficking to post customized content for that purpose. Its actions are calculated to continue pursuing this business for profit, while evading law enforcement.

The detailed allegations in the Senate Report include the following:

- Backpage has knowingly concealed evidence of criminality by systematically editing its adult ads. "Carl Ferrer, Backpage CEO instructed the company's Operations and Abuse Manager to scrub local Backpage ads that South Carolina authorities might review to conceal illegal sex-trafficking activity. 'Sex act pics remove ... In South Carolina, we need to remove any sex for money language also.' (Sex for money is, of course, illegal prostitution in every jurisdiction in the United States, except some Nevada counties.) Significantly, Ferrer did not direct employees to reject 'sex for money' ads in South Carolina, but rather to sanitize those ads to give them a veneer of lawfulness. Padilla replied to Ferrer that he would 'implement the text and pic cleanup in South Carolina only.'"
- Backpage coached its users on how to post "clean" ads for illegal transactions. Backpage CEO Ferrer wrote, "Could you please clean up the language of your ads before our abuse team removes the postings?" Ferrer did not reject the ad for an illegal transaction, but rather sought to edit the language in order to facilitate it.
- Backpage deliberately edited ads in order to facilitate prostitution. "Another former Backpage moderator, Backpage Employee A, similarly told the Subcommittee that 'everyone' knew that the Backpage adult advertisements were for prostitution, adding that '[a]nyone who says [they] w[ere]n't, that's bullshit.'"
- Backpage prescribed the language used in ads for prostitution. "Backpage Employee A also explained that Backpage wanted everyone to use the term 'escort,' even though the individuals placing the ads were clearly prostitutes. According to this moderator, Backpage

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 10

moderators did not voice concerns about the adult ads for fear of losing their jobs.”

- Backpage moderated content on the site in order to cover up prostitution. “An October 8, 2010 email [from] a Backpage moderator ... suggested the user was a prostitute. In response, Padilla rebuked the moderator: ‘Until further notice, DO NOT LEAVE NOTES IN USER ACCOUNTS. ... Leaving notes on our site that imply that we’re aware of prostitution, or in any position to define it, is enough to lose your job over. ... If you don’t agree with what I’m saying completely, you need to find another job.’”

This detail from a *Washington Post* report adds to the picture of Backpage as a highly active content creator:

The documents show that Backpage hired a company in the Philippines to lure advertisers — and customers seeking sex — from sites run by its competitors. The spreadsheets, emails, audio files and employee manuals were revealed in an unrelated legal dispute and provided to the *Washington Post*.

Workers in the Philippines call center scoured the Internet for newly listed sex ads, then contacted the people who posted them and offered a free ad on Backpage.com, the documents show. The contractor’s workers even created each new ad so it could be activated with one click.

Workers also created phony sex ads, offering to “Let a young babe show you the way” or “Little angel seeks daddy,” adding photos of barely clad women and explicit sex patter, the documents show. The workers posted the ads on competitors’ websites. Then, when a potential customer expressed interest, an email directed that person to Backpage.com, where they would find authentic ads, spreadsheets used to track the process show.

... [T]he workers in the Philippines either call or email with an offer to post their ad on Backpage free of charge, with the ad already created and ready to go.

... Invoices and call sheets indicate Backpage was pushing Avion to get as many new listings as possible, generating ads from competing sites including Locanto in Europe, Australia and South America, Eurogirlscort.com, Privategirls.com, PrivateRomania, Gumtree and many others.

And again, from the Senate Report:

"[Your team] should stop Failing ads and begin Editing ... As long as your crew is editing and not removing the ad entirely, we shouldn’t upset too many users. Your crew has permission to edit out text violations and images and then approve the ad.”

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 11

Assuming the facts alleged in the Senate Report and in the *Washington Post* are true, it is abundantly clear that Backpage is not a “mere conduit” of content created by others. It has been actively involved in modifying content in order to conceal the illegal activity on its site of which it is well aware. The company specifically instructed its employees and contractors to edit the language of advertisements for prostitution, and to create such ads from whole cloth. It rebuked them for suggesting that ads for prostitution be removed. In all of this, Backpage was acting as a content creator as that term is defined in Section 230 – thus surrendering any protections from state criminal or civil prosecution under Section 230.

It is well established in the case law that under Section 230, a website “can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is responsible in whole or in part for creating or developing, the website is also a content provider.” And once the website becomes a content provider, it loses its Section 230 protection. As the U.S. Court of Appeals for the Ninth Circuit, ruling *en banc*, has stated: “[Section 230’s] grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.”

The recent decision of the U.S. Court of Appeals for the First Circuit in *Jane Doe No. 1 v. Backpage.com LLC* came as a blow to efforts to hold Backpage liable to victims of sex trafficking. The court in that case rejected federal and state civil sex trafficking claims against Backpage. But the court did so on the ground that the entirety of the lawsuit was based on content created by third parties, thus entitling the defendant to Section 230 protection. The court held that the record before it expressly *did not* allege that Backpage contributed to the development of the sex trafficking content, even “in part.” Instead, the court said, the argument that Backpage was an “information content provider” under Section 230 was “forsworn” in the district court and on appeal.<sup>1</sup>

If these facts are properly pleaded, therefore, Backpage will not be able to hide behind Section 230 protections.

And indeed, a new complaint has been filed in the case of *Doe No. 1 et al. v. Backpage.com, LLC et al.* in U.S. District Court in Boston. This complaint expressly references the Senate Report findings and contains abundant allegations demonstrating that Backpage participated both in creating and developing content. The court is expected to rule on Backpage’s motion to dismiss

<sup>1</sup> A similar result was reached in the California case of *People v. Ferrer*, 16FE024013 (Cal. Superior Ct. Aug. 23, 2017), and for the same reason. The court specifically noted that prosecutors conceded that Backpage’s web ads were created not by Backpage but by third parties. It is not clear why this concession was made. The Staff Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com makes clear the opposite is true. A properly pleaded indictment should be expected to make at least summary allegations on this point.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 12

by the end of the year. If the court follows the clear language of Section 230 as written, the complaint will stand.

State prosecutors and civil attorneys will have the same ample basis to plead these facts that vitiate Section 230 protection for Backpage in other venues. There is no reason to think that they will not prevail on the law, since based on the facts as presented in the Senate Report, Backpage was not just a passive conduit for third-party content, but rather was creating and editing content to promote illegal activity and conceal its illegality. The plain language of Section 230 denies protection to one who is, even in part, involved in creating or developing content.

For this reason, the Supreme Court of Washington recently ruled that Section 230 *does not* forestall a lawsuit against Backpage for sex trafficking. In *J.S. v. Village Voice Media Holdings, LLC*, 184 Wash. 2d 95, 359 P.3d 714 (2015), the court stated the test of Section 230 exactly correctly: Backpage would not be a content creator if it “merely hosted the advertisements.” But if “Backpage also helped develop the content of those advertisements,” then “Backpage is not protected by CDA immunity.” *Id.* at 717.

The court cited the allegations in the complaint that Backpage’s “content requirements are specifically designed to control the nature and context of those advertisements,” so that they can be used for “the trafficking of children.” Moreover, the complaint alleged that Backpage has a “substantial role in creating the content and context of the advertisements on its website.”

Likewise, recent decisions by the Ninth Circuit Court of Appeals have held that a platform’s “duty to warn” is not protected by Section 230. Decisions by the Seventh Circuit Court of Appeals and in the Fourth Circuit have similarly rejected defendants’ claims that Section 230 protects them from suit.

These cases – including *Jane Doe*, *Ferrer*, and *J.S. v. Village Voice* – are fairly representative of the case law regarding Section 230 and Backpage. They illustrate what happens when prosecutors properly plead that Backpage is itself a content creator, and what happens when they fail to adequately plead this element. I should add, as the author of Section 230, that both the majority opinion and the concurrence in *J.S. v. Village Voice* have perfectly described the congressional intent and accurately parsed the plain meaning of the statutory language. If the re-filed *Jane Doe* complaint is upheld in Massachusetts, there will be significant momentum in the case law supporting Backpage prosecutions under state law without any interference from Section 230.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 13

#### **The Unintended Consequences of a Sex Trafficking Carveout**

Both SESTA, recently reported from the Senate Committee on Commerce, Science and Transportation, and H.R. 1865, which you are considering in this Subcommittee today, have a common feature. They would establish a specific standard within Section 230 that applies only to sex trafficking, but not to any other federal or state crimes and civil offenses.

Today, Section 230 applies equally to all offenses, criminal and civil. By structure and purpose, it is panoptic. This is to ensure that the application of Section 230 is as consistent as possible.

Were the statute to be amended to introduce new elements limited to a specific criminal or civil offense, the immediate question for judges and practitioners would be what impact the new standard would have on other offenses. It is an established norm of statutory construction that if a statute specifies one exception to a general rule, other exceptions or effects are excluded. Application of this principle to Section 230, so amended, could lead to the inference that the unwelcome judicial interpretations of Section 230 to which the amended law is putatively addressed (many of which deal with different crimes and civil offenses) are left untouched. Alternatively, a judge might attempt to graft the new standard for the one crime onto other criminal and civil offenses; but to do so would require analogy and much creativity because of the difference in the substantive offenses. This would essentially require judicial lawmaking and lead to uneven results from court to court and across jurisdictions.

A parallel problem from amending Section 230 “one crime at a time” is that Congress will surely be asked to follow up any such amendment with further amendments along the same lines. How can it be said that, for example, sex trafficking is worthy of special congressional attention but terrorism or murder for hire are not? The list of heinous criminal offenses is long enough – running at least into the hundreds, as measured only by state laws currently on the books. But civil offenses will need to be added as well. This approach is violative of the principles of both legislative economy and judicial economy. Congress will be forced repetitively to deal with each new exception. Courts will have to attempt to make sense of the growing complexity of the statute. The *expressio unius est* questions that will arise, difficult enough with the first carveout from Section 230, will become exponentially more difficult as each new exception is created.

A further problem is the new thread of case law that will develop under Section 230. The current architecture of HR 1865, the premises of which I fully accept and the ends of which I fully support, adds needless complexity and uncertainty to the law by making it more difficult for judges to evenly apply what is now a straightforward standard. That is because it would establish different rules for sex trafficking than for even very similar offenses such as child pornography. The language of the bill does not purport to generally amend Section 230 as it applies to all civil and criminal offenses. Because it does not likewise amend Section 230 with respect to these thousands of other offenses, it necessarily establishes one set of rules for sex

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 14

trafficking and a different set of rules for everything else.

What does this mean? What will judges infer from the decision by Congress to treat sex trafficking as a unique subject under Section 230? Will courts attempt to borrow conceptually from the new statutory language? Will they seek to import concepts of recklessness or strict liability into other interpretive contexts? They might.

Alternatively, they might do the opposite. Judges might fully credit Congress for lapidary style, meaning exactly what it said, no more, no less. In that case, only sex trafficking will be treated according to the new standard. The inescapable consequence of this reasoning, unfortunately, will be that other crimes and civil offenses will be treated according to the pre-HR 1865 rule that Congress did not like as it was applied in sex trafficking cases. We will then witness a profusion of decisions reading approximately as follows: “If Congress wishes to rectify this unjust result, it will have to amend the law for this offense as it did for sex trafficking.” This outcome would push decisional law in the direction of less sensitivity to the concerns of crime victims.

Across the spectrum between these opposite approaches, there are other reasonable variations that judges can be expected to adopt. The only certainty is that, because the approach of a single-crime carveout is inherently destabilizing, any number of outcomes is possible. This is the opposite of uniformity.

For the two decades of its existence, Section 230 has applied uniformly to all offenses, civil and criminal. Its standards are agnostic concerning the nature of the offense. There is nothing in the statute, express or implied, to lead courts in any other direction. This has been important in establishing predictability in the law’s application. Without predictable outcomes, the law’s purpose is severely undermined. By introducing a significant new element of unpredictability by virtue of its singular treatment of sex trafficking, HR 1865 as presently drafted would change all of this. It would make it more likely that courts will reach divergent results, undermining a consistent national standard that is coherent and predictable.

Throwing this curve into the developing Section 230 case law would come at a particularly bad time, as courts are just now beginning to rationalize two fundamental aims of the law. Section 230 means to incentivize standards of good behavior on the internet (through the “Good Samaritan” provision), and to preserve robust enforcement of criminal and civil laws against wrongdoers (through the designation of internet platforms that create or develop content “in part” as content providers themselves). While some courts have viewed these as competing goals and so weighed one more heavily than the other, the increasingly common view is that both purposes can be upheld. A sampling of the case law will make the point.

In *FTC v. LeadClick Media LLC*, 838 F.3d 158 (2d Cir. 2016), the Second Circuit held that websites linking to “fake news” could be liable for the content notwithstanding Section 230,

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 15

when it was alleged they were aware of the content and edited some of it. The court ruled that even though it was an “interactive computer service,” the company was also an “information content provider” because of its activities. The court correctly noted that within the statutory architecture of Section 230, one is not being “treated as the publisher or speaker of any information provided by another information content provider” when it is being treated as a content provider itself due to its responsibility “in part” for content creation or development.

In *Vision Security LLC v. Xcentric Ventures LLC*, 2:13-cv-00926-CW-BCW (D. Utah, August 27, 2015), a Utah district court denied Section 230 protection to a website whose “very raison d’être” was to encourage negative posts about businesses, and then sell those same businesses a program “to counter the offensive content [it] encouraged.” It was thus responsible in part for developing the third party content, and so fell within the definition of content creator itself.

Similarly, in *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit held that specific encouragement of unlawful content makes one responsible in part for developing that content, thereby vitiating Section 230 immunity.

In *eDrop-Off Chicago LLC v. Burke*, No. CV 12-4095 GW (FMOX), 2013 WL 12131186 at \*27 (C.D. Cal. Aug. 9, 2013), the straightforward allegation that a website owner “engaged in the selective editing and deletion of Plaintiffs’ own posts/comments (or the comments/posts of others attempting to add a favorable view of Plaintiffs and their activities)” was sufficient to defeat Section 230 immunity.

*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), is a particularly faithful application of the statute. Ruling *en banc*, the Ninth Circuit held that even though illegal content was created by third parties, the website itself was also a content creator by reason of its design of the interactive features of the website.

In *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), the court found that the Gawker website was not entitled to Section 230 protection because it allegedly encouraged defamation by its users, edited the content of their comments, selected defamatory comments for publication, and employed individuals who may have authored some of the comments.

And in *People v. Gourlay*, No. 278214, 2009 WL 529216 (Mich. Ct. App. Mar. 3, 2009), a web hosting company was held criminally responsible for hosting the illegal content of a minor’s website, despite a claim of Section 230 immunity. While acknowledging that the website was the content creator, the court held that so too was the web hosting company, because its activities made it responsible in part for developing the content.

These decisions, and others like them, stand collectively for the proposition that Section 230 does not protect bad actors whose violations of criminal or civil law are accomplished by means

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 16

of the internet. They show that Section 230 need not be a bar to prosecution of Backpage.com or any other persons or entities who commit any of the thousands of crimes and civil offenses on the federal and state statute books.

These cases also point to reasons that grafting unique provisions for sex trafficking onto Section 230 itself in the manner of H.R. 1865 as initially drafted could have major unintended consequences. By disrupting decisional law in unpredictable ways and unintentionally but effectively altering the law's incentives for innocent web platforms that rely on user-generated content, the approach of carving a single crime out of Section 230 creates unnecessary problems.

There more effective and responsible approach is the direct one: strengthen law enforcement against sex traffickers by giving prosecutors and civil plaintiffs better tools.

#### **Summary and Conclusion: Recommendations for Congressional Action**

1. *Amend H.R. 1865 to directly, rather than indirectly, attack the problem of sex trafficking via the internet.* Eliminate the one-crime carveout from Section 230. Establish a new crime of sex trafficking via website, with the purpose of giving federal and state prosecutors a powerful new weapon. As with the Travel Act, 18 U.S.C. 1952, the predicate offense can be defined as engaging in the business of prostitution, which presents prosecutors with fewer problems of proof. Sex trafficking, defined to include alternative elements such as a victim who is underage or who was subject to coercion, can then provide the basis for an enhanced penalty, allowing the criminal litigation to proceed to trial while the requisite facts are gathered.

State prosecutions of state law crimes with the same elements should be expressly authorized. In this way, the specified federal crimes, including sex trafficking via website, can serve as a model statute for state legislatures.

In addition, H.R. 1865 should expressly authorize state Attorneys General to enforce federal anti-sex trafficking laws. There is ample precedent for this. For example, Congress authorized state Attorneys General to prosecute "unfair, deceptive or abusive acts and practices" under the Consumer Financial Protection Act provisions of Dodd-Frank. Several state Attorneys General, most notably in Illinois, have filed cases in federal court under that authority. Similarly, certain federal antitrust statutes may be enforced by the state Attorneys General. It is common for DOJ's Antitrust Division and state Attorneys General to jointly file cases. Further examples are to be found in the many federal environmental statutes that authorize state Attorneys General, along with DOJ, to enforce criminal and civil provisions of federal law. In the same way, state Attorneys General can enforce Section 5 of the FTC Act. Section 5 allows enforcement against websites that knowingly and actively fail to enforce their own policies. Under "little Section 5," state Attorneys General can take enforcement actions directly.



Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 17

To ensure that civil restitution is available to victims without need of commencing a separate follow-on civil proceeding, the new law should provide for a unitary proceeding, with the judge in the criminal trial assigned responsibility for overseeing claims for civil restitution immediately following the establishment of criminal liability. This will spare victims many months and much uncomfortable adversarial process.

Finally, rather than a carveout from Section 230, which as noted would needlessly introduce interpretive challenges for judges and create great uncertainty, H.R. 1865 should include a contextually appropriate restatement of the law and its original intent. The restatement should be of the Section 230 text that applies equally to criminal and civil, federal and state actions.

By writing all of these provisions into the substantive criminal and civil law dealing with sex trafficking, lawmakers can avoid the thorny problems created by a single-crime carveout, which is the “narrowly targeted” but broadly problematic approach of H.R. 1865 as first introduced.

2. *Pass a Concurrent Resolution restating the original intent of Congress.* Because of the broad bipartisan agreement that exists today concerning the proper application of Section 230, Congress has a unique opportunity to authoritatively restate the intended purpose of the law. When Section 230 came before the House for a floor vote as a freestanding measure, it likewise enjoyed nearly unanimous support. For 20 years, the consistent position of the Congress has been that Section 230 is meant to incentivize good behavior on the internet and to ensure the continued robust enforcement of federal and state criminal laws. It was never intended as a shield for criminal activity of any kind. As written, Section 230 already makes clear that one who is responsible even in part for the creation or development of illegal web content cannot enjoy the protection it offers to innocent platforms. Yet some courts have strayed from this plain language, in dicta that would extend the law’s immunity for the innocent to those who clearly participate in content creation or development.

The law is premised on the notion that an internet portal or website cannot be expected to read or screen vast amounts of user generated content. When web platforms actually do read and screen content, however, they are protected only to the extent they are “Good Samaritans.” Certainly a platform that not only reads but edits content is, in the language of the statute, responsible at least in part for the creation or development of that content. Yet a few courts have averred that “merely editing,” or deciding whether to “alter content,” is not enough to make one a content provider. Such interpretations are at odds with the plain language of the statute.

Taking care to lay out the foundational premises of Section 230, its legislative history, its careful language, and its stated purposes, a concurrent resolution can underscore the purpose of the law to deny protection to internet platforms even partly complicit in the creation or development of illegal content. Given the strong support for this interpretation in both the House and Senate, it should pass both chambers with overwhelming margins. Such an authoritative statement will

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 18

help judges struggling with case law that is still under development, as well as state and local prosecutors and civil plaintiffs who have every right to proceed with their cases under existing law.

Congress should remind the courts of what Section 230 already says: No website operator who is responsible even in part for creating or developing illegal content – including but not limited to the promotion of sex-trafficking – can hide behind Section 230.

3. *Call on U.S. DoJ to bring criminal cases against known bad actors.* As noted, Section 230 has no application to federal sex trafficking prosecutions. Individual congressional representatives have already called on the Department of Justice to act to address the problems of sex trafficking via the internet. Congress should act in concert, demonstrating the massive bipartisan support for federal enforcement actions in this area, by initiating a bipartisan letter from all Members to the Attorney General and responsible officials at the Department of Justice. Every interested committee should be encouraged to participate in this effort, in the Senate as well as the House.

4. *Use the power of the purse.* The Appropriations Committees in both chambers can use language in appropriations bills to ensure the Department of Justice is attending to enforcement in this area.

5. *Engage internationally.* The scourge of sex-trafficking websites is not limited to jurisdictions within the United States. The prevalence of such notorious websites as Locanto, Eurogirlescort.com, Privategirls.com, PrivateRomania, and Gumtree State, located in Europe, Australia and South America, make it essential that our national government coordinate with allies around the world in cooperative cross-border enforcement. Lacking an international base of operations, state Attorneys General are typically unable to bring actions against extra-territorial bad actors. The Department of Justice is in the best position to move against such sites. This committee and the full Congress should encourage Justice to use its full power and its international relationships with law enforcement abroad to attack the problem of online sex trafficking at its roots, both within and outside the United States.

6. *File amicus briefs to stress congressional intent in Section 230.* As prosecutors and civil plaintiffs continue to bring cases before federal and state appellate courts, they could benefit from commentary, legal arguments, and evidence of Congressional intent provided in the form of amicus curiae briefs. By filing an amicus brief, Congress can assist courts in applying Section 230 as written and as intended. This approach can bring benefits both in the short term, by achieving positive results in individual cases, and in the long term by clearly establishing the rights of prosecutors and plaintiffs to move against bad actors.

Honorable Marsha Blackburn  
 Honorable Michael F. Doyle  
 November 30, 2017  
 Page 19

7. *Create a joint federal-state Strike Force and a joint strategic plan with state AGs.* Congress should insist that federal and state law enforcement work together on putting criminal sex traffickers in jail. DoJ's Criminal Division Child Exploitation and Obscenity Section (CEOS) should appoint all interested state Attorneys General to a joint state-federal Strike Force. Together they should develop a plan to maximize their joint resources and authorities, and implement it swiftly.

As part of this joint action, DoJ should use its power to appoint participating state Attorneys General as "Special Attorneys" under 28 U.S.C. §543. The authority of the Attorney General to appoint "Special Attorneys" dates to 1966. (The statutory authority was most recently amended in 2010.) The internal Department of Justice authority appears in the United States Attorneys Manual (USAM) at USAM §3-2-200. The authority is very broad, and the terms of the appointment are entirely negotiable. In this way, every state Attorney General who wishes to do so can exercise the full authority not only of his or her state law, but also federal law. As Section 230 has no application to federal criminal law, any theoretical arguments about its application to a given state prosecution will immediately evaporate.

There is precedent for this approach. The U.S. Department of Justice has long appointed state and local prosecutors as uncompensated "Special Assistant United States Attorneys" (SAUSAs), using its statutory authority. These appointments have included collaborative federal-state work on matters such as reducing the supply of illegal drugs in the United States. The counter narcotics collaboration has extended to investigating and prosecuting priority national and international drug trafficking groups and providing sound legal, strategic and policy guidance in support of that end. Through this joint federal-state approach, the federal government has assisted the states with policy advice and support, drawing on its unique resources including intelligence and international enforcement relationships.

The Justice Department has also appointed state and local prosecutors as SAUSAs to prosecute violent crimes under the Organized Crime Drug Enforcement Task Forces (OCDETF) and High Intensity Drug Trafficking Areas (HIDTA) programs. In these cases, the Special Attorneys would typically be compensated by their employer – either the state Attorney General or a state or county District Attorney. They would be given the same authority to prosecute cases in federal court as any other federal prosecutor. Currently, U.S. Attorneys across the country as well as various decision units at DOJ rely upon SAUSAs to handle these types of crimes today.

Finally, as part of its mandate under the Strike Force umbrella, the Department of Justice should be asked to examine the language of pending bills to amend Section 230 and report back to the appropriate Congressional committees. Such an analysis will help this and other committees in Congress avoid unforeseen consequences in the application of federal and state criminal laws in other areas, while ensuring that any new statutory language does not unintentionally incentivize private litigants to sue small e-commerce businesses over matters having nothing to do with the

Honorable Marsha Blackburn  
Honorable Michael F. Doyle  
November 30, 2017  
Page 20

bill's stated purposes – thereby harming innovation and making U.S. e-commerce less competitive.

In each of these areas, NetChoice stands ready to help.

Sincerely,

A solid black rectangular box used to redact the signature of Chris Cox.

Chris Cox  
Outside Counsel, NetChoice



## Congress must stop sex trafficking on the internet

Marsha Blackburn Published 7:13 a.m. CT Nov. 29, 2017



(Photo: Larry McCormack / THE TENNESSEAN)

Recently in Brentwood, the Tennessee Bureau of Investigation (TBI) arrested 22 men for soliciting sex with a minor through backpage.com.

This was the 11th sting conducted by the TBI since 2015. This activity is beyond reprehensible, and the internet has only made it easier for sex traffickers to operate in the shadows.

We must act legislatively to give law enforcement the tools they need to protect children.

On Thursday, I will chair a hearing on the House Energy and Commerce Subcommittee on Communications and Technology on H.R. 1865, "Allowing States and Victims to Fight Online Sex Trafficking Act of 2017," which was introduced earlier this year by Rep. Ann Wagner.

This bill will clarify that law enforcement may take actions against morally repugnant websites that facilitate sex trafficking, regardless of the immunity they otherwise enjoy for user-generated content.

While to many Americans, the internet has been a source of inspiration and a platform for innovation, there is unquestionably a dark side to the web.

The anonymity of the internet provides cover for criminals to recruit trafficking victims and find buyers or sellers, exploiting some of our most vulnerable populations for profit — particularly children. Standing by idly is simply not an option.

**Read More:** [22 indicted in 'significant' Brentwood human trafficking sting](https://www.washingtonpost.com/news/technology/wp/2017/11/09/tbi-announces-significant-human-trafficking-sting-brentwood-22-indicted-brentwood-human-trafficking/848135001/) <https://www.washingtonpost.com/news/technology/wp/2017/11/09/tbi-announces-significant-human-trafficking-sting-brentwood-22-indicted-brentwood-human-trafficking/848135001/>

For many years, Congress has given the tech community a free pass on this and other concerns. But while a light-touch regulatory approach is necessary to allow the internet ecosystem to flourish, there must be a balance for a mature industry that serves so many important purposes in our society.

With maturity comes responsibility, and it is time that we hold companies accountable for their actions when they cross the line.

This certainly does not mean that we intend to push heavy-handed regulation, but there must be consequences for turning a blind eye to conduct that shocks the moral conscience and victimizes children.

It is incumbent upon the Congress to act to keep up with the technological advances that have led to an explosion in sex trafficking.

So often in Washington, we are faced with a situation where the House acts, and the Senate fails to do so. However, this time, the Senate has moved first with the Commerce Committee's approval of SESTA (the "Stop Enabling Sex Traffickers Act"), and while the bill isn't perfect, it would give law enforcement some new tools to address an ancient problem.

**November political cartoons from the USA TODAY Network**

The committee members have accomplished what many believed to be impossible — bringing together victims' rights groups and tech companies to take a proactive step in protecting current and potential victims of sex trafficking. With some more work, I believe the bill currently before the House could achieve the same goals.

We have a real chance to take a step in the right direction. Federal legislation here would be good for the people of Tennessee, and good for the people of the United States.

I am determined to do whatever I can to help legislation move through the House, and to lend a helping hand to those groups who work so tirelessly for victims who cannot speak for themselves.